FILE COPY

NO. 61

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,
Appellants,

v.

SEATRAIN LINES, INC.

Appeal from the District Court of the United States for the District of Delaware.

REPLY BRIEF ON BEHALF OF SEATRAIN LINES, INC., APPELLEE.

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REPLY BRIEF ON BEHALF OF SEATRAIN LINES, INC., APPELLEE.

I.

OPINIONS BELOW.

The opinion of the three-judge statutory court from which this appeal is taken is reported at 64 F. Supp. 156 and is included in the printed record at pp. 119-131. The challenged certificate of the Commission is set forth at pp. 22-23 of the printed record; the accompanying report of the Commission on reconsideration is reported as *Seatrain Lines, Inc., Common Carrier Applications*, 260 I. C. C. 430 and is reproduced at pp. 23-51 of the printed record. The original report of Division 4 is not reported but is reproduced in the printed record at pp. 53-56.

II.

JURISDICTION.

The final decree of the three-judge District Court was entered on February 7, 1946. (R. 132) The petition for appeal was presented and allowed on February 27, 1946. (R. 133-134) Probable jurisdiction was noted on April 22, 1946. (R. 433) The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219-221, 28 U. S. C. 45, 47a, and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

III.

STATUTE INVOLVED.

The statute involved is Part III of the Interstate Commerce Act, particularly sections 309(a), (b), (c), (d) which are set forth in Appendix A to this brief.

IV.

QUESTIONS PRESENTED.

1. Whether the Interstate Commerce Commission has statutory authority, two and one-half years after granting a certificate to a common carrier by water for the transportation of commodities generally, to cancel such certificate and issue a "corrected" certificate in which it imposes new limitations, not as to the commodities carried or as to the ports served, but as to the service methods by which the common carrier may conduct its operations and as to the persons from whom it may receive freight and to whom it may deliver freight.

2. Whether a common carrier by water to which the Commission has issued a certificate as a common carrier of commodities generally, may prevent the Commission from cancelling the certificate and from imposing limitations which change the status of the carrier to that of car ferry, where it is shown that the carrier has spent large sums and made important commitments in reliance upon the original certificate.

3. Where a common carrier by water of commodities generally has received from the Commission a certificate under the "grandfather" clause authorizing it to continue its operations, including the receipt and delivery of traffic from its shippers and connecting lines by truck and by lighter at its own stations and terminals, does the Commission have statutory authority to cancel the certificate two and one-half years later and issue a "corrected" certificate imposing restrictions as to methods of service under which the carrier is precluded from reaching its own stations, from receiving freight from or delivering freight to its own shippers or connecting water and truck lines, and under which it is reduced to the status of railroad car ferry?

4. Where two different applications for certificates are filed, one for "grandfather" rights and one for future rights based only on public convenience and necessity, may the Commission, after having determined as to the latter that the public convenience and necessity require that the carrier receive a certificate as a common carrier of commodities generally, cancel the said certificate and issue a new certificate in which the criterion employed in measuring public need is the "grandfather" rights erroneously determined for another and different service?

5. Where a common carrier by water, confronted by the Commission with a proposed cancellation of its certificate and the substitution of a "corrected" certificate completely changing its status to its disadvantage and injury, and where it has warned the Commission that it has made substantial commitments and incurred substantial expense on the basis of the original certificate, and that the Commission lacks authority to take the action proposed, but the Commission nevertheless proceeds to cancel and "correct" the certificate, was it error on the part of the district court to receive evidence as to the acceptance by the carrier of and action taken and investments made by it in reliance upon the original certificate when such evidence had not been first presented to the Commission, although such evi-

dence was not directed to the regulatory or administrative issue within the Commission's jurisdiction?

V.

STATEMENT.

The statement of the case in appellants' brief does not clearly present the circumstances out of which the issues arose and the following statement is presented as a background for the argument of appellee's contentions.

Appellee, Seatrain Lines, Inc., commenced operation between New York harbor and New Orleans, La., via Havana, Cuba, in 1932. In May, 1940, it inaugurated service between New York harbor and Texas City, Tex. It operated these services continuously until its ships were requisitioned by the United States for war purposes in 1942.

Since Seatrain's Texas City service had not been started until May, 1940, Seatrain had no "grandfather" rights in this operation but was entitled to make application under the "interim" clause, which is the last sentence in Section 309(a), p. 76 *infra*. This it did in due season, praying the issuance to it of a certificate authorizing it to engage in transportation as a common carrier by water of commodities generally between New York harbor and Texas City. All competitors were notified but none objected or sought a public hearing. The Commission entered upon an investigation and through its field staff examined Seatrain's records and other matters. Seatrain was called upon to produce additional data which it did. Seatrain presented unchallenged proof from shippers of the need of additional steamship service out of Texas City and between Texas ports and the North Atlantic ports, and referred the Commission to evidence before it on the matter in another proceeding.

Seatrain's New York-New Orleans service had been in operation since 1932 so that it was entitled under the "grandfather" clause to have a certificate issued to it authorizing it to continue that service. It applied season-

ably for such a certificate, describing its operation as that of a "common carrier by water of commodities generally." Notice of this application was likewise served on competing water carriers and others and none made objection thereto. The Commission conducted an investigation examining Seatrain's records and other matters to confirm the fact and nature of the operations. The Commission's attention was again called by Seatrain to the evidence and to the Commission's own reports and findings in various proceedings wherein the Commission had been called upon to investigate and receive proof as to Seatrain's New York-New Orleans service.* Seatrain furnished the Commission with all additional data requested of it.

Since the application as to the New York-New Orleans service involved grandfather rights only, and since the application as to the New York-Texas City service involved no grandfather rights, but only the extent of public need for the service, Seatrain requested the Commission to keep the two applications separate and make them the subjects of separate reports and orders. This the Commission did not do and on July 2, 1942, it issued its report and order upon both applications through its Division 4 (R. 53-56). This admixture and confusion of the two applications operated to the disadvantage of Seatrain and to the denial of its rights, as hereinafter shown. (*Infra* p. 42)

As to the New York-New Orleans service, the Commission, by Division 4, found under the grandfather clause that Seatrain had been engaged in bona fide operation as "a common carrier by water of commodities generally" and was entitled to a certificate authorizing it to continue in such operation.

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* *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215 (1933); 206 I. C. C. 328 (1935); *Seatrain Lines, Inc.* v. *Akron, Canton & Youngstown Railway Company, et al.*, 226 I. C. C. 7 (1938); 243 I. C. C. 199 (1940); 259 I. C. C. 297 (1944); *Hoboken Mfrs. R. Co.* v. *Akron, Canton & Youngstown Railway Company, et al.*, 234 I. C. C. 114 (1939); *Hoboken Manufacturers' Railroad Company* v. *Abilene & S. Ry. Co.*, 206 I. C. C. 328 (1935); 237 I. C. C. 97 (1940); 248 I. C. C. 109 (1941).

With respect to the New York-Texas City service, the Commission, by Division 4, found that the public convenience and necessity required Seatrain to engage in transportation between these ports as "a common carrier by water of commodities generally."

By its order dated July 2, 1942, the Commission issued a certificate to Seatrain (R. 52) authorizing it to continue in operation as a common carrier by self-propelled vessels "in the transportation of commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico." The order was issued subject "to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

No objection to this order was made by any party. It was accepted by Seatrain and became effective according to its terms on August 10, 1942.

The order and certificate issued to Seatrain were in all respects similar to the certificates issued to other water carriers in the coastwise trade with which Seatrain was in competition (R. 198).* The Court will observe that neither in the certificate issued to Seatrain nor in the certificates issued to any of its competitors did the Commission define the type of ship to be operated or define the service methods by which the carrier might perform its transportation service, or specify the parties from whom it might receive and to whom it might deliver freight.

In reliance upon the original certificate Seatrain spent large sums of money and made important commitments. It acquired at Edgewater, N. J., valuable terminal property from the Colgate-Palmolive-Peet Company at a cost of over $200,000 (R. 181, 183). It also reacquired title from the government to four vessels, costing $7,700,000 (R. 176)

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* Similar certificates issued to Southern Steamship Company, The Bull Steamship Line, Pan-Atlantic Steamship Corporation, and Southern Pacific—"Morgan Line"—are set forth at pp. 352-364 of the printed record.

which had been requisitioned for title for war purposes and which had been so altered by the government as to make their commercial use impracticable without expenditures of $200,000 each for reconversion. Two of the vessels had been so altered for war purposes that it would cost approximately $800,000 each to re-alter them for the limited use required by the "corrected" certificate. (R. 178-9) In reacquiring these four vessels Seatrain agreed to relieve the government of any expense for reconditioning in excess of $200,000 each. (R. 177-180) In addition, Seatrain maintained two of its terminals at great expense, although they were not needed during the war, and continued and supplemented its tariffs in anticipation of resuming service, at a cost of over $140,000 a year for maintaining its facilities and tariffs (R. 180). The record shows affirmatively and without contradiction that these expenditures and commitments would not have been made if the original certificate were restricted and limited as the Commission has attempted to do (R. 179, 181). The new terminal property purchased at Edgewater, N. J., was obtained for the receipt and delivery of freight other than in cars, as it was especially suitable for the accommodation of lighterage and truck freight. (R. 182-183)

Moved by a change in policy resulting from its action on December 18, 1943, in another case involving a small water carrier operating on Puget Sound, *Foss Launch & Tug Co. Applications*, 260 I. C. C. 103, wherein the Commission held for the first time that the broad expression "common carrier by water of commodities generally" does not include transportation by car ferry, the Commission *on the same day* reopened the Seatrain application case for further consideration, giving the decision in the *Foss case* as the reason for such reopening (R. 56-57). Two weeks later the Assistant Director of the Commission's Bureau of Water Carriers addressed a letter to counsel for Seatrain suggesting that in view of the Foss decision Seatrain's certificate

should be amended to authorize Seatrain to engage in operation only

> "as a common carrier by the 'Seatrain' type of vessels, in interstate or foreign commerce, in the transportation of liquid cargoes in bulk; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from freight cars between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex. . . . " (R. 59-60)

Having thus made up its mind that the Seatrain certificate should be re-examined in the light of the new policy in the *Foss case*, the Commission set the matter for hearing. (R. 68) Seatrain filed a motion to set aside the order of reopening on the ground that it was for a purpose beyond the Commission's power, the Commission having no power to revoke or cancel a certificate or any substantial part thereof (R. 69). Prior to the hearing and in support of its motion Seatrain filed an affidavit of Seatrain's president setting forth the action taken by Seatrain in reliance upon the original certificate and the expenses and obligations incurred by Seatrain which would be nullified and rendered worthless if the certificate were cancelled and limited as proposed (R. 76). The Commission, however, denied Seatrain's motion and proceeded with the hearing. At the hearing counsel for Seatrain renewed the motion, which was again denied, and appealed from Division 4 to the entire Commission. Seatrain also protested the hearing on the combined certificate and requested segregation. The motion was denied by the full Commission and the matter was again set for hearing. Because appellee conceived that the Commission was without authority to revoke the rights granted by the original certificate and that, therefore, the hearing was for purposes beyond the Commission's jurisdiction, and since the Commission did not ask it to supply additional data, Seatrain appeared specially without offering evidence.

Thereupon the Commission made the report and order of February 6, 1945, which are the subject of this suit (R. 22). This "corrected" order would revoke the original certificate and the rights granted to Seatrain thereby and would limit Seatrain, except for the transportation of liquid cargoes in bulk, to the transportation of empty railroad cars and

> "of property loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars." (R. 22)

Seatrain contends that the "corrected" certificate goes far beyond the mere attaching of conditions to the *exercise* of the privileges granted in the original certificate and revokes such a substantial amount of the original grant as actually to change the status of Seatrain from that of a common carrier of commodities generally to that of mere car ferry operating as a bridge carrier only between railroads. Later in this brief (*Infra*, p. 58-59) it will be shown that, as the Commission has found, Seatrain has been an important carrier of rail-water, water-rail and port-to-port traffic, issued on its own bills of lading. Also, that it serves its own shippers and consignees and interchanges with other water carriers by lighter and truck.* Also, that it maintains its own terminals and freight stations in the Manhattan area.* Seatrain contends that under the "corrected" certificate it cannot continue to handle the above-mentioned categories of traffic because such freight is not interchanged with a railroad, nor is it interchanged in railroad cars. Hence it is impossible to handle such traffic "without transfer from railroad cars." Under the severe limitations of the "corrected" certificate Seatrain can handle only "bridge" traffic which comes from a railroad and is delivered to a railroad and handled in through service without transfer, this latter traffic constituting only 25 per cent of the total. (R. 188)

This was to be a test case to determine the extent of the Commission's power to prescribe the service methods by

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* Appellants' brief p. 38.

which common carriers by water shall conduct their operations. For this reason other common carriers by water, competitors of Seatrain, were permitted to intervene, it being their position that "there is involved the question as to the authority of the Commission to modify or revoke a certificate which has been granted and become effective, and the decision herein may become a precedent which will govern the Commission's decision with regard to other certificates." (Interventions of Ocean Steamship Company, Agwilines, Eastern Steamship Lines, and Bull Steamship Line, R. 347-350). Recognizing that it was a test case, Commissioner Porter said at the hearing in response to the statement of Seatrain's counsel that Seatrain's status at the hearing was that of guinea pig: "It seems to me we had just as well try it out with you as anybody I know of." (R. 333)

In making this a test case the object was to determine the right of the Commission to revoke the outstanding certificate of any carrier, and prescribe service methods to govern its operations. Since the Commission had abundant facts concerning Seatrain, including the decisions in prior Seatrain cases which the presiding Commissioner agreed were part of this record, and since the proposed action was regarded by Seatrain as being clearly beyond the power of the Commission, it introduced no evidence. Under the circumstances no new evidence was called for. Seatrain had supplied every bit of information which the Commission requested in connection with the original application and thereafter the Commission did not suggest, either in connection with the new hearing or otherwise, that it desired from Seatrain additional factual data. In fact, the proposed report and order were prepared and served *prior to hearing* and were based on the old record. (R. 60) The order of January 27, 1944, reopening the *Seatrain Certificate case* for hearing merely recited that "question has arisen" as to whether the rights granted to Seatrain "are not too broad" and that the question in issue at the hearing would be whether the certificate should be modified by im-

posing the service restrictions here in issue. (R. 68). Since Seatrain is a common carrier subject to the Commission's jurisdiction, the Commission could have ordered Seatrain to submit additional data. But it did not request it, nor did it need any additional data if the matter was to be determined upon the record already made.

Seatrain instituted this suit in the court below to set aside and annul the Commission's "corrected" order. The district court of three judges annulled the "corrected" order as prayed and the United States and the Commission have appealed to this Court.

SUMMARY OF ARGUMENT.

1. The "corrected" certificate represents an attempt by the Commission, two and one-half years after the original certificate was issued, to change completely the status of appellee by imposing limitations, not as to commodities carried or as to ports served, but as to the service methods by which appellee may conduct its common carrier operations. The result is to reduce appellee's status from that of common carrier of commodities generally to that of railroad car ferry, and to deprive Seatrain of three-fourths of its normal business.

2. The Commission not only has no statutory authority to revoke a certificate but expressly asked the Congress not to give it such power.

3. Under the "corrected" certificate appellee is given far less than its "grandfather" rights as to the New York-New Orleans service, with the result that it cannot receive traffic from its own shippers or deliver traffic to its own consignees, or serve its own freight stations, or receive traffic from lighters or trucks, or interchange freight in any way with other water lines, all of which things it did during the "grandfather" period.

4. The government's claim that the original certificate was inadvertently issued is contrary to "the facts of record." The Commission has admitted that it deliberately re-

opened the *Seatrain* case because of, and on the same day as, its decision in the *Foss* case, wherein it held for the first time that the expression "common carrier by water of commodities generally" is not sufficiently broad to include transportation by car ferry.* The reopening of the *Seatrain* case was due to this change in administrative policy, and not to inadvertence. The certificate originally issued was in complete harmony with the Commission's decisions in at least seven prior cases as to the status of Seatrain.

5. Even if there were inadvertence as to the grandfather rights covering the New York-New Orleans service, there could not have been inadvertence as to the New York-Texas City service, because the certificate as to the latter was based solely on public convenience and necessity, and there have been no findings made, and none could be made on this record, that the public convenience demands the severe restrictions and the drastically curtailed service here imposed.

6. Even if the Commission had correctly determined Seatrain's grandfather rights as to the New York-New Orleans service, which it did not do, it was error for the Commission to use said grandfather rights as the criterion for measuring the extent of the public convenience and necessity as to the New York-Texas City service, especially where no findings have been made, or could be made on the record, that the public convenience demands the severely restricted service authorized in the "corrected" certificate.

7. Whether or not a certificate is technically a franchise, it is similar to a franchise in that it is issued in perpetuity and confers important public rights and obligations, and the law is clear that such a grant cannot be revoked or substantially modified to the disadvantage of the grantee after substantial reliance thereon by the grantee, in the absence of fraud or non-use.

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* However, the Commission has held that Seatrain is not a car ferry. *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215.

8. Where the Commission threatens, as it did here, to impose without statutory authority severe restrictions upon a certificate completely changing the status of a carrier, to its great injury, and where the carrier duly warns the Commission of its reliance upon the original certificate and duly moves for rescission of the action reopening the proceeding on the ground of the Commission's lack of power to take the proposed action under the statutes and under the Fifth Amendment, but the Commission proceeds nevertheless to take the action, the carrier is within its rights in showing to the Federal Court, in an injunction proceeding, how it would be injured by the action proposed by reason of large expenditures and important commitments made solely in reliance upon the original certificate.

9. The Commission's criticism of Seatrain for alleged failure to introduce new evidence at the hearings scheduled as a basis for cancelling its certificate and completely changing its status is manifestly unfair where it appears that the Commission called for no additional evidence and needed no additional evidence because its proposed action was based on alleged inadvertence in granting to Seatrain more rights than were justified by the record already made and by the Commission's findings in numerous previous cases.

10. It was not error of the court below to receive evidence as to Seatrain's acceptance of and of the investment made by it and action taken in reliance upon the original certificate when such evidence was not presented to the Commission. The evidence was not directed to any administrative question as to Seatrain's "grandfather" rights or as to the public interest and was therefore not proper evidence before the Commission and was relevant only in the injunction proceeding for the purposes thereof. Furthermore, the receipt of this evidence by the lower court did not render valid the "corrected" order of the Interstate Commerce Commission, so that that order was properly enjoined regardless of the receipt or rejection by the court of the evidence as to Seatrain's action in reliance thereon.

11. The government's emphasis on Seatrain's adaptability to the handling of freight in railroad cars gives a wrong perspective. Only about one-fourth of Seatrain's traffic is so-called "bridge traffic" moving through in cars without transfer. Under the "corrected" certificate Seatrain would be precluded from handling three-fourths of its traffic, including all of its lighterage, truck and local station traffic, none of which can be handled "without transfer." The government's emphasis on Seatrain's adaptability to the handling of freight in railroad cars gives the impression that the Commission is restricting Seatrain to the handling of freight in cars because it does not want Seatrain to enter the "break-bulk" business and thus destroy its own admitted efficiency. Seatrain handles most of its rail-water, water-rail and even port-to-port traffic in railroad cars, but it does not interchange with railroads at each end of its line traffic originating within the port area, or destined to the port area, or both, nor does it receive and deliver such freight in cars from shippers, consignees, and connecting water lines, nor does it handle such freight "without transfer from railroad cars." All of these things it would be prohibited from doing under the "corrected" certificate and three-fourths of its business would be taken away.

I.

ARGUMENT.

THE GOVERNMENT'S CLAIM THAT THE "CORRECTED" CERTIFICATE RESTORES APPELLEE TO ITS POSITION IN THE TRANSPORTATION SYSTEM IS NOT SUPPORTED BY THE RECORD.

Throughout the government brief appears the intimation, and at times the direct statement, that under the "corrected" certificate Seatrain could handle all of its normal business and that the purpose of the limitations is to "establish substantial parity between future operations and

prior bona fide operations." (Brief pp. 27 and 35) The first sentence in the government's "Summary of Argument" is that "Seatrain's operations were correctly reflected by the amended certificate and incorrectly reflected by the original certificate." (Brief, p. 19) But the record shows (R. 188) that Seatrain's "bridge" traffic, which is all that could be handled under the "corrected" certificate, constitutes less than 25 per cent of its total business.

At page 22 of the brief the government derives satisfaction from its claim that the Commission is not "barring Seatrain from the sea." But appellee submits that it threatens to do so because the record shows (R. 192) that Seatrain could not exist under the restrictions imposed.

The effect of the "corrected" certificate can be understood only by dividing Seatrain's traffic into categories and studying the effect of the "corrected" certificate on each category. This may be done as follows:

1. *"Bridge" traffic.* Seatrain handles through freight in cars with a rail haul at both ends of the water haul. This traffic Seatrain may continue to handle under the "corrected" certificate, but it constitutes less than 25 per cent of its entire traffic. (R. 188)

2. *Port-to-interior and interior-to-port traffic.* Seatrain handles a considerable volume of traffic originating, for example, in interior Louisiana and Texas, moving by rail to the ports of New Orleans and Texas City, thence via Seatrain's vessels to New York harbor for lighterage or truck delivery in New York harbor. The Commission admits that Seatrain is entitled to handle lighterage freight and truck freight. (Appellants' brief, p. 38) Included in this category is appellee's own station traffic received at or consigned to its two stations in the Manhattan area which are served only by truck. (R. 183) All of this traffic Seatrain would be precluded from handling because the "corrected" certificate specifies that it may receive traffic only from railroads and deliver traffic only to railroads and without transfer from railroad cars.

3. *Port-to-port traffic.* The Commission has found in one of the cases made part of this record that "most of Seatrain's coastwise traffic has been handled on what Seatrain claims to be a strictly port-to-port basis, namely, on local ships' bills of lading between Hoboken and New Orleans." *Investigation of Seatrain Lines, Inc.,* 195 I. C. C. 215 at page 224. Included in this port-to-port traffic is lighterage traffic which is not interchanged with railroads and which is very substantial in volume. *Hoboken Mfrs. R. Co.* v. *Akron, C. & Y. Ry. Co.,* 234 I. C. C. 114 at page 122. This local port-to-port traffic is handled on Seatrain's responsibility and, as stated, on its own bills of lading. None of it could be handled under the "corrected" certificate because the certificate limits Seatrain to traffic received from *and* delivered to railroads. This clearly means railroad participation at *both* ends of the water haul.

At page 38 of its brief the government suggests that such local traffic could be handled "just as it always has" in railroad cars. While it is true that most of this traffic has been handled in railroad cars because of physical limitations at Hoboken (R. 188, 190, 191), the important fact is that such traffic is neither received from nor delivered to a railroad and is in no sense railroad interchange freight even when, for Seatrain's convenience, it is transferred from lighters to cars rented by Seatrain at the Hoboken pier. (R. 40) That such lighterage traffic has not been interchanged with Hoboken Manufacturers Railroad, the only railroad with which Seatrain has had physical connection at New York, is conceded by the Commission, which has also found that the volume of such traffic is very heavy, constituting 478 cars in 10 months. (*Hoboken Manufacturers Railroad case,* 234 I. C. C. 114, 122.) In addition, this traffic could not be handled under the "corrected" certificate because it is physically impossible to handle lighterage traffic without transferring it between railroad cars and lighters. Seatrain has repeatedly challenged the government to show how such lighterage traffic can be handled without transfer

from railroad cars, but they have not answered the challenge except to say (p. 37 of their brief), with an obvious lack of confidence, that "*it is believed* that Seatrain can handle this type of traffic under the amended certificate." (Emphasis supplied) The following is from pages 36 and 37 of appellants' brief:

> "Seatrain claims that, in addition to and apart from the goods which it handled in railroad cars, it carried 'commodities generally' which moved from its own freight station without receiving a prior or subsequent rail haul. But, in view of the fact that this traffic has to be loaded into freight cars, and shifted to or from the vessels at ports with rail facilities, *it is believed* that Seatrain can handle this type of traffic under the amended certificate." (Emphasis supplied).

These categories of traffic which Seatrain would be precluded from handling under the "corrected" certificate constitute three-fourths of its total business (R. 188). Thus it will be seen not only that the status of Seatrain is completely changed from that of a common carrier of commodities generally to that of mere "bridge" carrier between railroads, but that it is deprived of three-fourths of its normal business.

Under these circumstances it is most unfair to give the impression that Seatrain could handle all the traffic it previously handled. In the past Seatrain's traffic has been handled primarily in railroad cars but not always. As to Texas City, although the service was comparatively new, the volume of large pressure vessels, boilers and the like which were handled other than in railroad cars was growing (R. 189 and 307), disputing the government's claim that Seatrain can and did handle traffic only in railroad cars. One of the objects of acquiring the Edgewater terminal was to enlarge and improve the handling of both lighterage and truck traffic to and from cars at Seatrain's terminal. (R. 182)

The record shows that Seatrain is under a legal obligation to serve its shippers, consignees and connecting water lines as well as its Manhattan station, all as shown in its tariffs. For example, the rates in its tariffs apply to and from its Manhattan station unless otherwise specified.* Item No. 2335 on page 111 of Seatrain Lines' Tariff I. C. C. No. 20, a comprehensive tariff of 190 pages in which are published local, joint and proportional rates on classes and commodities between the New York district, on the one hand, and the New Orleans district, on the other hand, contains the following item:

> "Except as noted in individual items, rates published herein to or from New York, N. Y., will apply to or from Manhattan Terminal (New York, N. Y.) of Seatrain Lines, Inc."

While under the limitations of the "corrected" certificate Seatrain is converted into a railroad car ferry and limited to service between railroads, the Commission has itself recognized that Seatrain is a common carrier of traffic between ports on its own bills of lading and that it serves other points within the port districts than the railroad docks. Thus in its original report in this case it said:

> "While the actual operation has been between docks at Hoboken and Belle Chasse, it has consisted of service to points which are within the ports of New York and New Orleans, respectively, and the operation should be authorized to and from these ports." (R. 54)

Here the Commission was at pains to point out that Seatrain is more than a "bridge" carrier, between two railroads, recognizing that it is a port-to-port carrier. It was because of these other services that the Commission held that Seatrain was not a car ferry. It was something more,

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* The Seatrain tariffs were received in evidence only for the purpose of showing the nature of the holding out. (R. 141-142) (These tariffs are a part of the record in this Court on appeal. They were not printed as a part of the transcript of record by special leave of Court.)

namely, a common carrier of commodities generally as distinguished from a car ferry.

Commissioner Lee points out in his dissenting opinion that Seatrain has been a local port-to-port carrier, and a participant in water-rail and rail-water traffic as well as a participant in business which involves a rail haul at both ends of the water haul. Indeed, he quotes the Commission's own language from *Hoboken Mfrs. Ry.* v. *Abilene & S. Ry. Co.*, 248 I. C. C. 109, as follows:

> "It seems appropriate here to point out that Seatrain contends, and the record indicates, that it transported various commodities in port-to-port service, on its own billing, which were not 'loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars.' In Hoboken Mfrs. Ry. v. Abilene & S. Ry. Co., 248 I. C. C. 109, at page 113, we found that:
>
> "'Moreover, the evidence shows that Seatrain does move a very substantial number of empty cars, routing them preferably by Havana in the hope that there they may pick up loads. It is also shown that a large volume of traffic via Seatrain originates or terminates at the ports, and that a supply of cars for traffic so originating is there maintained at Seatrain's expense.'
>
> "The reports of our investigation of Seatrain disclose that it leased cars from private car companies." (R. 44)

On page 18 of appellants' brief Seatrain is challenged to show from the record that crude rubber was handled in any manner except in railroad cars. On pages 265, 266 and 278 of the record appears a detailed list of the largest moving commodities in Seatrain's Texas City service for a three months period in 1941. Crude rubber appears, with 4533 tons shown. (R. 265) The important point is not whether the traffic is or is not handled in railroad cars. The point is that such traffic is transported by Seatrain without having been handled by any railroad or interchanged with any railroad at New York, as found by the Commission in *Hoboken*

Mfrs. R. Co. v. *Akron, C. & Y. Ry. Co.*, 234 I. C. C. 114. This rubber was necessarily handled in accordance with Seatrain's tariffs (Exhibit 2), the applicable tariff item reading as follows:

> "*Absorption of Lighterage Charge on Crude Rubber, Carloads*"
>
> "On import shipments of CRUDE RUBBER in carloads, billed at through rates applicable from New York, N. Y., and delivered by lighter to piers of Seatrain Lines, Inc., in Hoboken, N. J., Seatrain Lines, Inc. will absorb lighterage charges of 2.7 cents per 100 pounds." (Supplement No. 2 to Seatrain Tariff I. C. C. No. 22, page 5, Item No. 81).

Seatrain's I. C. C. Tariff #39 shows that the rubber rates were applicable only to interior southern and southwestern points, such as Natchez, Mississippi and Memphis, Tennessee. This large and important tonnage was received by lighter from connecting water lines as provided in Seatrain's I. C. C. Tariff 20, Supplement No. 76, Item 2679. Seatrain concedes that every pound of this rubber was handled by it in railroad cars which were loaded by Seatrain on its docks at Hoboken from the lighters, which brought such freight from connecting water lines to the docks, the cost of lighterage being absorbed by Seatrain as provided in its Absorption Tariff. Obviously imported rubber is not received by Seatrain in a railroad car, nor could it be handled without transfer. It is not handled by any railroad or interchanged with any railroad at New York. The commodity which the government selected for use as a challenge turns out to be one of the principal commodities which the "corrected" order would prohibit Seatrain from carrying.

At page 38 of their brief appellants say:

> "We submit, therefore, that Seatrain under the corrected certificate can handle traffic at its own freight stations or lighterage from New York harbor, *just as it always has*, but such freight and such lighterage must

> be delivered to it in railroad cars in the future, *just as they always have in the past;* it can receive freight from other water carriers, motor carriers, or by wagon, but such freight must be loaded into freight cars so that the loading and unloading devices of Seatrain can be used; obviously, since the freight is in railroad cars, it cannot be delivered to any other carrier than a railroad; and there are terminal switching roads at Hoboken and New Orleans from which carriers it receives and delivers the freight. See p. 29, *supra.* (Emphasis supplied)

As an illustration of the arrangements which Seatrain has with steamship lines for the handling of commodities like imported crude rubber, reference is made to Seatrain's Tariff I. C. C. 20, Supplement No. 76,* Item 2679, on pages 5 and 8 covering agreements with other steamship lines, which provides that Seatrain's regular port-to-port rates named in this tariff are not applicable to such movements. This clause reads as follows:

> "Port-to-port rates named in this tariff will not apply on foreign commerce moving under agreements approved and on file with the Interstate Commerce Commission, as described below."

As above stated, the Commission has not only recognized that Seatrain's lighterage traffic is *not* interchanged with railroads, (234 I. C. C. 122) but the Commission refers to 478 carloads of such handled traffic in ten months (*ibid.*). None of this traffic could be handled under the "corrected" certificate for the same reasons that crude rubber could not be handled. At the risk of repetition, the important consideration is not the use of railroad cars, for which the Sea-

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*Pursuant to the Transportation Act of 1940 common carriers by water having arrangements with other steamship lines for through transportation were authorized to publish notice to that effect in their I. C. C. tariffs. Notice of the arrangements which plaintiff had was published and became effective on March 1, 1941. See, for example, page 8 of Supplement No. 122 to appellee's tariff I. C. C. No. 20.

train vessels were primarily designed, but the handling of freight *without transfer* and the exclusion of all shippers, consignees, connecting water carriers and connecting motor carriers by the requirement that the loaded cars must be received from and delivered to *railroads* at *both* ends of the water haul. There is no precedent in all the books for excluding a common carrier by water from receiving freight from its own shippers and delivering freight to its own consignees or from interchanging freight with other water carriers or motor carriers.

At page 20 of the government brief it is stated that Seatrain "never carried commodities generally." This is a serious misstatment of fact. It is contrary to the findings of record. Not only does the record show a widely diversified list of commodities handled by Seatrain (R. 265-6) but the Commission has not here sought to impose limitations at the commodity level. Even under the "corrected" certificate Seatrain could carry every commodity shown in its tariffs. The restriction is on the *method of carrying* and the *type of facilities used* and not on the *commodities*.

In a decision in 1935 the Commission said:

> "A large volume of diversified traffic moves between the Southwest and eastern-seaboard territory. Generally speaking, the distribution of this traffic between the all-rail and the break-bulk rail-water routes is determined largely by the measure of the respective rates."
>
> * * * * * * * * *
>
> "In addition, certain classes of bulk freight which cannot be handled in vessels of the usual type, and which cannot bear the all-rail charges, can be handled by Seatrain, and thus markets opened up for them which theretofore could not be reached." (*Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, 333, 335.)

II.

THE COMMISSION'S "CORRECTED" ORDER IS INVALID AS AN ATTEMPT TO DEFINE THE NATURE OF EQUIPMENT WHICH A WATER CARRIER MAY EMPLOY, THE METHOD OF HANDLING FREIGHT WHICH IT MAY USE, AND THE PARTIES WITH WHOM A COMMON CARRIER OF GENERAL COMMODITIES MAY INTERCHANGE FREIGHT, SINCE NO AUTHORITY TO DO THESE THINGS IS CONFERRED BY THE ACT.

Under the original certificate Seatrain was authorized, as were all competing carriers by water, to conduct its transportation service without restriction as to service methods. Shippers and carriers were free to decide what method was most efficient. The amended certificate here would restrict Seatrain to the handling of freight in railroad cars only, to the interchange of freight with railroads only at both ends of its line and to the handling of all freight without transfer from railroad cars.

Congress refrained from giving the Interstate Commerce Commission jurisdiction over the *service* methods of water carriers, although five years earlier it had expressly given the Commission jurisdiction over the service methods of motor carriers. Section 208 of the Motor Carrier Act gives the Commission jurisdiction to specify the type of service to be rendered by motor carriers, but the corresponding provision (Sec. 309(d)) of the Water Carrier Act confers no such jurisdiction. So striking is the difference in this respect between two otherwise similar statutes that we quote them:

As to Motor Carriers

"Sec. 208. *(Added August 9, 1935) U. S. Code, title 49, sec. 308* (*a*) Any certificate issued under section 206 or 207 shall specify *the service to be rendered* and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if

any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require." (Emphasis supplied).

As to Water Carriers

"309 (d) Such certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, *or service* within the scope of such certificate, as the development of the business and the demands of the public shall require. . ." (Emphasis supplied)

Attention is called to the italicized words "*the service*" to be rendered in Section 208 and their *omission* from the same clause in Section 309 (d). Not only does Part III give the Commission no jurisdiction over the service methods of common carriers by water but the provision in Sec. 309 (d) is an express prohibition against attaching any terms, conditions or limitations which restrict the right of water carriers to add to their equipment, facilities *or service* within the scope of their certificates, whereas the corresponding proviso in the Motor Carrier Act, while prohibiting the Commission from restricting a motor carrier to add to its equipment or facilities, does not prohibit the Commission from imposing limitations as to *service*. In spite of this clear distinction between the two statutes, the Commission has here undertaken to impose upon Seatrain restrictions relating to the *service* methods of conducting its common carrier operations, thus appropriating to itself jurisdiction which Congress was most careful to avoid giving it.

There is no doubt about the Commission's right to prescribe service methods for motor carriers. The leading case is *Crescent Express Lines* v. *United States*, 320 U. S. 401 (1943), where the Commission held, and was sustained by this Court, that a motor carrier could not use a larger vehicle than a six-passenger sedan. Under the circumstances the government's reliance on the *Crescent case*, a motor carrier case, is especially significant. No similar ruling may be made as to water carriers because the statute withholds from the Commission power regarding the service methods of water carriers.

The decision of this Court in *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 322 U. S. 1, 4, relied upon at page 46 of appellants' brief, is by no means inconsistent with this view. There it was held, as to motor carrier operation, that the Commission might require the motor carrier to extend its routes beyond the scope of its application. Requiring a motor carrier at the time a certificate is issued to extend its

routes is hardly in the same category as specifying how a water carrier shall conduct its operations.

The statement on page 47 of appellants' brief that the Commission has "limited Seatrain to the same kind of freight" is incorrect. No limitation has been imposed as to the kind of freight. Seatrain can carry any commodity named in its voluminous tariffs. *The limitation relates to service methods* and to the persons from whom Seatrain may *receive freight and to whom it may deliver freight.*

Appellee stresses the important fact that its method of handling lighterage and truck freight at Hoboken has been unsatisfactory because of cramped and inadequate facilities. The very purpose of acquiring new property at Edgewater was to add to the facilities so as to enable Seatrain "to handle freight to and from the lighter". (R. 182) For lighters at Hoboken, Seatrain "only had two berths and they were very congested berths on a very narrow pier". (Ibid.) It became necessary for Seatrain to acquire more ample and more adequate terminal facilities at Edgewater so that the lighterage and truck freight could be more efficiently and expeditiously handled. (*ibid.*) The space around the new warehouse at Edgewater is "ideal for the receipt and delivery from the trucks", (R. 182) and one of the objects of acquiring the new terminal was to enable traffic to be warehoused, coopered, weighed, counted, etc., which cannot be done, of course, if the traffic must be handled "without transfer". "The entire Colgate property is quite useless to us under this corrected certificate and I can't see how it is possible for us to use it". (R. 182-183)

These additional facilities which would permit improved methods of handling at Edgewater are precisely the type of facilities and equipment which Congress must have had in mind when it provided in Section 309(d) that "no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require. . . ." Seatrain acquired at Edgewater expensive additional facilities and

added to its equipment in order to give the service that the public demanded and the Commission has imposed restrictions which render useless such additional facilities and equipment, thus depriving the public of that which Congress sought to give. It would be difficult to visualize a more flagrant departure from the express prohibition in the statute.

The failure of Congress to vest in the Commission jurisdiction over the service methods of common carriers by water does not represent a departure from established policy. The Commission has never had jurisdiction over the service methods of railroads, except in periods of car shortage or other emergencies. Section 1(15) of Part I.

This matter is of extreme importance to the water carriers. Their service methods must be elastic. Vessel types are not constant, nor are terminal facilities. The possibility of handling truck trailers on vessels has had recent consideration in *Savage Application*, 260 I. C. C. 603. It is the declared policy of Congress to foster and develop a merchant marine, and it is the desire of Congress that the merchant marine shall be as efficient as possible. The preamble to the Interstate Commerce Act provides that "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation . . . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers . . ." Common carriers by water were to be given great latitude as to their methods of conducting business and adapting their service to the needs of commerce. It was clearly contemplated, as shown by the proviso in section 309(d), that they were to be free to employ new inventions at will; that they were to be encouraged to improve their methods of receiving and delivering freight, and to devise radically new methods of handling and stowing freight on board their ships. This freedom the Commission would deny to water carriers while leaving the railroads free to employ any service methods they please.

The domestic merchant marine would be greatly impaired if water carriers could not determine the service methods most suitable to their shippers and consignees. What may happen if the Commission interferes with these matters and enters the field of managerial discretion is shown by the effect of the "corrected" certificate on Seatrain's new facilities at Edgewater, which, as above stated, would be rendered totally useless if the action of the Commission here is sustained. (R. 182-3)

III.

THE COMMISSION WAS AND IS WITHOUT STATUTORY AUTHORITY TO REVOKE OR SUBSTANTIALLY WITHDRAW THE CERTIFICATE RIGHTS OF A COMMON CARRIER BY WATER.

The court below correctly described the principal issue in this case as "the authority of the Commission to alter drastically its original certificate." The court concluded that "there is no statutory authority for the revocation or alteration of the certificate."

The following is from the record in the court below:

> "Biggs, J. Let us reduce it even more narrowly. Let us assume, arguendo, that they had not acted on it (the certificate), that they had merely received it. Treat it from your angle. Where does the Commission get the power to revoke it?
>
> "Mr. Dumbauld. As I say, there are no decisions I know of on the point." (R. 200)

Unlike the Motor Carrier Act (Part II of the Interstate Commerce Act) and unlike the Civil Aeronautics Act (Title 49, U. S. C. Secs. 401-681), the Commission is given no power under the Water Carrier Act (1940), (Part III of the Interstate Commerce Act) to revoke the certificate rights granted to common carriers by water. Not only that, but the Interstate Commerce Commission asked Congress *not* to give it the power of revocation as to common carriers by water.

Not often does legislative history speak so positively as it speaks here as to the Commission's absolute lack of power to revoke. The Congress, which five years before (1935) had given the Commission power to revoke the certificates of motor carriers, was studying S. 2009, which later became the Water Carrier Act (Part III of the Interstate Commerce Act), and sought the Commission's advice as to various aspects of the bill, including the matter of power to revoke certificates. On January 29, 1940, a report was made to the Congress by Commissioner Eastman, chairman of the Commission's Legislative Committee, on behalf of the Commission, which included the following paragraph:

> "House bill. This bill leaves section 212(a) unchanged and has no corresponding provision in the new part III. While there is room for argument, *we are inclined to believe that provision for the revocation or suspension of water carrier certificates or permits is not essential, if adequate penalty provisions are provided for violations of part III.* Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement, since there are so many such carriers, and the operations of the great majority are so small, that enforcement through penal actions in courts presents many practical difficulties, but this is not true of water carriers." (R. 123-124) (Emphasis supplied.)

Congress took the Commission's advice and withheld the power to revoke, although the power to revoke the certificates of motor carriers had been expressly given to the Commission only five years before in the Motor Carrier Act. Section 212(a) of that Act (Part II of the Interstate Commerce Act), provides that any motor carrier certificate may "be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission . . ."*

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* Section 212(a) of Part II is set forth in Appendix B to this brief.

In like manner the Civil Aeronautics Act, section 401(h), provides that the Civil Aeronautics Authority may, after hearing, "alter, amend, modify, or suspend any such certificate, in whole or in part, . . . or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation" etc. The Civil Aeronautics Act was enacted June 23, 1938, two years before Part III of the Interstate Commerce Act.

It is highly significant that Congress, five years after it had expressly vested in the Commission power to revoke motor carrier certificates, and two years after it had vested in the Civil Aeronautics Authority power to revoke the certificates of air carriers, enacted Part III of the Interstate Commerce Act applicable to common carriers by water without a single word about revoking, canceling or suspending such certificates. And it is of course doubly significant that this failure to follow the pattern of the Motor Carrier Act and the Civil Aeronautics Act followed representations to the Congress by the Interstate Commerce Commission to the effect that inclusion of provisions for revocation or suspension of water carrier certificates was not essential if adequate penalty provisions were provided for violating Part III. (Heavy penalties for violation of any provision of the Water Carrier Act or of any rule, regulation, requirement or order thereunder, or any term or condition of any certificate or permit are provided in section 317 of Part III).

So important is the power to revoke the certificate of a common carrier that it is unthinkable that the power can be derived by implication. A certificate constitutes the franchise of a common carrier by water and represents its right to live. To revoke the certificate is to destroy the franchise and to destroy the right to live. And we are dealing here with a part of the American merchant marine which it is the policy of Congress to foster and preserve. The Court will doubtless take judicial notice of the large capital in-

estment required for steamship lines operating in the oastwise trade. Such investment would be discouraged if he Interstate Commerce Commission had power to revoke ranchise rights, or to withdraw a substantial part of them. t would be well-nigh impossible to induce investors to spend millions of dollars in a steamship venture if the basic franchise on which the whole operation rested could be substantially withdrawn or impaired after reliance upon it. The situation as to steamship lines in this respect differs materially from the situation as to motor carriers which are very numerous and which have comparatively small investments. Commissioner Eastman, in his statement to the Congressional committee, stressed the large number of motor carriers, most of which are small. It is one thing to revoke the certificate of a motor carrier which owns two or three trucks with a ready resale value; it is quite another thing to revoke the certificate of a water carrier which has investments in large and specially designed steamships and in terminal facilities in the New York district and in Texas and Louisiana. Congress was well aware of these differences when it granted the power to revoke as to motor carriers but withheld it as to water carriers. And the Commission was also well aware of the difference when it recommended to Congress that the same power which had been vested in it as to motor carriers be withheld as to water carriers.

The leading case, among the decisions of the Commission, on the question of revocation of a certificate is *Smith Bros. Revocation of Certificate*, 33 MCC 465, decided in 1942. While that is a motor carrier case it is of significance here because of certain principles which the Commission recognized in its decision. The Commission says at page 472 of the decision:

> "In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions and accord-

ing to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, modified, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding. To hold that under section 208 (a) we have the power to include in certificates self-executing forfeiture terms, conditions, or limitations would make section 212 (a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the Act."

The above decision is doubly significant because the Motor Carrier Act expressly gives the Commission power to revoke a certificate, whereas, as we have seen, no such power is given in Part III of the Act. If the Commission's authority to revoke a motor carrier certificate is "expressly marked off and limited" what is to be said of its authority to revoke the certificates of water carriers as to which the statute confers no power of revocation whatever?

Likewise in *Quaker City Bus Co.—Purchase—Blackhawk Line, Inc.*, 38 MCC 603, the Commission said at page 606:

> "The existence of a certificate creates a vested motor-carrier status which stays in force and effect for the life of the certificate. After issuance of a certificate the holder thereof must be accorded the opportunity of complying with all the terms of the certificate before the vested right can be revoked."

The government argued, to the evident surprise of the court below, that the Commission has more power to revoke or alter a certificate where the statute is silent on the point than where the power to revoke is expressly given. (R. 202)

The government relies on *Connors Marine Co., Inc. Contract Carrier Application*, 250 I. C. C. 717, as authority for the proposition that it may withdraw a certificate grant. It appears that in this case two corporations applied for certificate rights, one as a contract carrier and one as a common carrier. They had common officers and directors, and the Commission granted common carrier rights to both of them in order to avoid the difficulty of vesting dual rights in two corporations so closely intertwined. Upon reconsideration the Commission decided that they should follow the rule of this Court in *United States v. N. E. Rosenblum Truck Lines, Inc.*, 315 U. S. 50, wherein this Court frowned upon multiple rights on the basis of a single transportation service. The two certificates were withdrawn and a single certificate issued covering both corporations. There is no corresponding issue here, nor is there any evidence that in the case cited the rights vested.

Similarly in *Boudreaux Contract Carrier Application*, 260 I. C. C. 67, the Commission found Boudreaux entitled to operate as a common carrier by towing vessels and issued a certificate. Upon protest and reconsideration the Commission imposed a new geographical limitation in a modified certificate. There was neither a showing that the rights had become vested nor any objection to the issuance of the modified certificate. Indeed, the applicant stated to the Commission that he was too ill to undergo the physical strain incident to a hearing and to avoid the ordeal stated that he was willing to forgo his claim to any rights taken away by the new geographical limitation imposed.

Again, in W-103, *Hutton Contract Carrier Application*, (I. C. C., Mar. 7, 1944), Division 4 found that applicant was entitled to a common carrier certificate for operation in New York harbor and on the New York State barge canal and Niagara River. The proceeding was reopened on the Commission's own motion, and the certificate was modified to restrict Hutton to towing operations. Apparently applicant was willing to have his rights restricted to his old basis of

operation, because there is no indication that he protested or challenged the Commission's action. However that may be, the Hutton case was a grandfather case, whereas the present case, as to the New York-Texas City operation, involves the determination of public convenience and necessity for the future.

The government relies also upon *Baldwin* v. *Milling Co.*, 307 U. S. 478, which held that where the Commission awards reparation to a shipper and later modifies its order, as it has statutory power to do, the money must be refunded. There is, of course, no vested right in money erroneously paid. But this is a far different matter from the withdrawal of franchise rights which have become vested after reliance upon them.

IV.

A CERTIFICATE ISSUED TO A COMMON CARRIER OF COMMODITIES GENERALLY BY WATER IS ANALOGOUS TO A FRANCHISE.

It is not necessary for the purposes of this case to determine that a certificate issued to a common carrier of commodities generally by water is literally a franchise. It suffices that such a certificate has many of the indicia of an ordinary franchise. This matter has an important bearing on the right of the Commission to withdraw a substantial part of the original grant after substantial reliance thereon by the grantee.

The courts have been at pains to distinguish between permits or licenses, which are temporary, and franchises, which are perpetual. A franchise is public in nature, usually involving important public rights and obligations, while a license is personal and temporary. One may have a license to operate a dance hall, or to take fish from certain waters, or to sell liquor, or to practice law. Such licenses are usually temporary or revocable and do not include the taking or use of public property or involve the right of eminent domain. In quite a different category are the franchises of

public utilities, such as telephone companies, gas companies, water companies, and common carriers.

In *Trustees of Southampton* v. *Jessup*, 162 N. Y. 122, cited with approval in *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, the court said at pages 126 and 127:

> "A license is a personal, revocable and nonassignable privilege given by writing or parol to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands. (*Greenwood Lake etc. R. R. Co.* v. *N. Y. & Greenwood Lake R. R. Co.* 134 N. Y. 435, 440, and cases cited.) 'Although originally revocable at the will of the licensor, it may become irrevocable through the expenditure of money by the licensee' (Id.)
>
> * * * *
>
> "A franchise is a grant by or under the authority of government, conferring a special and usually a permanent right to do an act, or a series of acts, of public concern, and, when accepted, it becomes a contract and is irrevocable, unless the right to revoke is expressly reserved. (*People ex rel. Atty.-Genl.* v. *Utica Ins. Co.*, 15 Johns. 357, 387; *Bank of Augusta* v. *Earle*, 13 Pet. 519, 595; *California* v. *Pacific R. R. Co.*, 127 U. S. 1, 40.) These definitions, while not comprehensive enough to cover all cases, are sufficient for the case in hand.
>
> "The right in question is not a license, because it is neither temporary nor personal, as the drawbridge and roadway authorized are substantial, fixed and permanent improvements, for the benefit of defendant's lands, and assignable therewith."

Even a cotton gin can be of such a public nature that its right to operate is in the nature of a franchise. In *Frost* v. *Corporation Commission*, 278 U. S. 515 (1928) this Court considered an Oklahoma statute which declared that cotton gins are public utilities and that no one may operate a cotton gin without first securing a permit from the State Corporation Commission. In holding that such a permit is a franchise, the Court said:

"It follows that the right to operate a gin and to collect tolls therefor, as provided by the Oklahoma Statute, is not a mere license, but a franchise, granted by the State in consideration of the performance of a public service; and as such it constitutes a property right within the protection of the 14th Amendment. See *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, 9; *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 40-41; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 328, 329; *Owensboro* v. *Cumberland Teleph. & Teleg. Co.*, 230 U. S. 58, 64-66; *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 90-91; *McPhee & McGinnity Co.* v. *Union Pac. R. Co.*, 148 Fed. 5, 10-11.

"In *California* v. *Pacific Railroad Co.*, 127 U. S. 40-41, a franchise is defined as a 'right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security . . . No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises . . . . The list might be continued indefinitely.'

"Specifically, the foregoing authorities establish that the right to supply gas or water to a municipality and its inhabitants, the right to carry on the business of a telephone system, to operate a railroad, a street railway, city waterworks or gas works, to build a bridge, operate a ferry, and to collect tolls therefor, are franchises. And these are but illustrations of a more comprehensive list, from which it is difficult, upon any conceivable ground, to exclude a cotton gin, declared by statute to be a public utility engaged in a public business, the operation of which is precluded without a permit from a state government agency, and which is subject to the same authority as that exercised over transportation and transmission companies in respect of rates, charges and regulations. Under these conditions, to engage in the business is not a matter of common right, but a privilege, the exercise of which, except

in virtue of a public grant, would be in derogation of the state's power. Such a privilege, by every legitimate test, is a franchise."

As Commissioner Lee points out in his able dissent (R. 40), in the absence of a fixed term of life, or of an express reservation of the right of revocation, a franchise obtained without fraud or misrepresentation is perpetual and irrevocable except possibly for nonexercise or nonuser. Commissioner Lee cites *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, and *New York Electric Lines* v. *Empire City Subway*, 235 U. S. 179 and cases there cited.

In the *Owensboro case* it appears that the city by ordinance granted to a telephone company the right to place and maintain poles and wires on the city streets. After the company had operated for a quarter of a century the city council got the idea that it would like to obtain some revenue from the telephone company, so it passed another ordinance requiring that the poles and wires be removed from the streets or that the telephone company, in the alternative, pay a substantial sum to the city for its right to continue in operation. The city relied strongly, as the government does here, on a reservation in the granting ordinance to the effect that the ordinance might be altered or amended as the necessities of the city might demand. This Court held, however, that even such a reservation could not be relied upon to impair substantially the value of the franchise. Mr. Justice Lurton, speaking for the Court said:

"A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the licensor when the license was given have been made. See *Greenwood Lake & P. J. R. Co.* v. *New York & G. L. R. Co.*, 134 N. Y. 435, 440; *Southampton* v. *Jessup*, 162 N. Y. 122, 126.

"That the grant in the present case was not a mere license is evident from the fact that it was upon its face neither personal nor for a temporary purpose. The right conferred came from the state through delegated power to the city. The grantee was clothed with the franchise to be a corporation and to conduct a public business, which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law and it was subject to all the police power of the city."

The Court emphasized the necessity of viewing as permanent the rights granted under franchises, saying (p. 66):

"If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People* v. *O'Brien*, 111 N. Y. 1, 42, a decision accepted and approved by this court in *Detroit* v. *Detroit Street Railway*, 184 U. S. 368—'The grant to the Railway Company may or may not have been improvident on the part of the municipality, but having been made and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held, under the legislation and facts, that the right created by the grant of the franchise was perpetual, and not for a limited term only.'"

In *New York Elec. Lines Co.* v. *Empire City Subway Co.*, 235 U. S. 179, the Court held, Mr. Justice Hughes writing the opinion, that there is "a tacit condition annexed to grants of franchise that they may be lost by misuser or non-user." The Court cites with apparent approval the *Owensboro case* and other cases holding that a franchise gives the grantee a perpetual and indefeasible interest, and it also quotes with approval a statement in *Louisville* v. *Cumberland Telephone and Telegraph Co.*, 224 U. S. 649, 659, to the effect that "Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but howsoever designated, it is property."* Yet the Court in the subway case concludes that a franchise may be revoked for non-user on the ground that reasonable exercise of the rights and privileges granted is an implied condition of every grant, as is also the condition that the grant shall have been obtained without fraud or misrepresentation. See also *Levisa River Railroad Company Construction*, 257 I. C. C. 203 (1944), where a certificate to a railroad company was revoked 15 years after it had been issued because "The evidence . . . establishes that the Levisa company had no immediate intention of resuming construction of its line, and, had the Norfolk and Western application not been filed, probably would not have resumed construction prior to the expiration date of its certificate. It still has no definite prospects for the movement of traffic." Apparently on the ground that this was sufficiently close to non-exercise of the rights to justify revocation and also on the ground that there was misrepresentation in securing the certificate, it was revoked.

In *Thunder Bay Limestone Co.* v. *D. & M. Ry. Co.*, 294 Fed. 958 (D. C. Mich.), the court, with regard to a railroad

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* Compare the language of the court below: "The inviolability of the certificate is clear whether it be considered a purely statutory creation or to be of the nature of a franchise." (Footnote 11 to the decision) (R. 124)

holder of a certificate of convenience and necessity, said (p. 962):

> "It has vested rights in and under such certificate of public convenience and necessity."

Thus it appears well established that there is no power to repeal or modify franchise rights without the consent of the holder when the right is not expressly reserved even though the grantor, on later reflection, may come to regard the original grant of the franchise as improvident or the result of the exercise of poor judgment. *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 66.

A certificate issued to a common carrier by water under Part III has many of the earmarks of the ordinary public utility franchise. It is a grant by the government to a private person; it confers valuable rights; it is clearly distinguishable from a mere license; it relates to a public matter; it casts upon the grantee important obligations; it runs in perpetuity. And, just as an ordinary franchise cannot be revoked unless the right to revoke is expressly reserved, so a certificate cannot be revoked unless statutory provision is made for revocation.

There was here a substantial revocation as distinguished from the mere attaching of conditions to the exercise of the privileges, for under the limitations of the "corrected" certificate appellee could handle only its "bridge" traffic, representing less than one-fourth of its normal business.

At page 25 of their brief appellants attempt to belittle a certificate by referring to a statutory limitation to the effect that no certificate "shall confer any proprietary or exclusive right . . . in the use of public waterways." But this very exception indicates that franchise rights were authorized; otherwise this express limitation would not have been necessary.

V.

SEATRAIN SPENT LARGE SUMS IN RELIANCE UPON THE ORIGINAL GRANT.

The record shows that Seatrain, acting in reliance upon the original certificate, made important commitments and spent large sums of money. It acquired from the Colgate-Palmolive-Peet Company at Edgewater, N. J., property, including a four-story building suitable for a freight station and warehouse, at a cost of $200,000, this property adjoining the main yards of the Susquehanna Railroad. (R. 181, 183).

In addition the Texas City Terminal, not needed for wartime operation, has been maintained at a cost of over $30,000 annually. (R. 180) Other costs of maintaining the organization have brought the total to over $140,000 a year to maintain the coastwise organization and facilities. (R. 180)

Seatrain also reacquired from the government four vessels having an original cost of $7,700,000 and claim for just compensation was waived. (R. 176). Instead of fulfilling its obligation to return the vessels in the same condition (they had been altered for war use, two of them extensively) the Government agreed to allow Seatrain $200,000 per vessel for reconversion for commercial use but it would cost Seatrain $800,000 each to re-alter two of the vessels so that they could function under the restrictive terms of the "corrected" certificate. (R. 178)

> "Judge Biggs: You embarked on this because you had the original certificate?
>
> "Mr. Brush: That is right, sir, and we never conceived that the Commission had the power or would try to tell anybody how to conduct its operation." (R. 179).

The total loss to Seatrain caused by the "corrected" certificate would be $2,100,000, "which is two-thirds the entire capital which I raised to put into this Company. Now we

can't stand that loss, and as a result . . . those two ships have been offered for sale . . ." (R. 180).

The record shows that these expenditures and commitments would not have been made except in reliance on the original certificate. (R. 181)

The following is from the record in the court below:

> "Mr. Dumbauld: If you were to restrict your future operations to the moving of cars and the shipping of cars from rail to Seatrain boats and back again to rail, would you need the additional facilities?
>
> "Mr. Brush: No, we would not need the facilities we formerly had.
>
> "Mr. Dumbauld: Why not?
>
> "Mr. Brush: Because there is not enough of that traffic.
>
> "Mr. Dumbauld: I see.
>
> "Mr. Brush: All the other facilities like your freight house, lighterage berths, and pier where we receive and deliver goods and interchange with trucks, you would not need any of those." (R. 188)

What Mr. Brush meant was that the new terminal would be quite useless under the "corrected" certificate because only "bridge" traffic could be handled and not even its former station or terminal facilities for truck or lighterage traffic would be required. (R. 182-3)

Having thus made substantial expenditures and commitments in reliance upon the original grant, appellee is protected by the Fifth Amendment against having its certificate rights withdrawn.

VI.

THE COMMISSION HAS CONFUSED THE NEW YORK-NEW ORLEANS APPLICATION AND THE NEW YORK-TEXAS CITY APPLICATION.

At page 20 of the government brief, in discussing the New York-Texas City application in comparison with the New York-New Orleans application, the following statement is made: "The original and the amended certificates

cover both routes, and that circumstance has never been seriously objected to". This is a misstatement of fact. From the very outset Seatrain has insisted that the Commission separate the New York-New Orleans application from the New York-Texas City application and the Commission has at all times refused to do so.

The reason for Seatrain's insistence upon a separation is that the law relating to "grandfather" applications is entirely different from the law applicable to applications for the future based on public convenience and necessity, and the Commission's duties in the premises are quite different.

As to grandfather rights, the statute contemplates merely an inquiry into the common, contract or private carrier status of the applicant and the routes and ports served and makes mandatory issuance of a certificate accordingly, regardless of the need of the service or its efficiency. (Section 309(a)) A certificate based on public convenience and necessity, on the contrary, has no necessary relation to past service and involves an inquiry into the extent to which a proposed service is required in the public interest. An applicant for a proposed service who has no other service could not be tied to service methods employed by him in the past. The Newtex certificate issued three weeks prior to Seatrain's "corrected" certificate and covering the same route has no restrictions whatever as to service methods; Like other certificates, the certificate issued to Newtex was in all respects similar to Seatrain's original certificate. It is of interest to note that in originally deciding the Newtex certificate matter the Commission found that the future public convenience and necessity required operation by Newtex, even though Newtex had no vessels and the Commission did not know what type of vessels they would obtain or by what methods their service would be conducted. The Commission said in its decision in the Newtex case: "Applicant has no vessels available to perform the service. It intends to secure vessels as soon as conditions permit. We will therefore withhold issuance of a certificate at this

time". *Newtex S. S. Corporation Common Carrier Application*, 260 I. C. C. 418, decided January 11, 1945. Somewhat later Newtex acquired a vessel and the Commission issued a certificate to the Newtex line effective October 12, 1945, similar to the original Seatrain certificate.

In like manner in its original decision as to the Seatrain certificate, the Commission held upon consideration of the evidence, including numerous letters from the shipping public which are set forth at pages 293 to 322 of the printed record, that "the present and future public convenience and necessity require operation by applicant as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation of commodities generally between the ports of New York and Texas City. . ." (R. 56)

In spite of this clear finding, and in spite of a comprehensive record showing public need for Seatrain's service, including the need for the handling of articles so large that railroad cars cannot handle them (R. 307), the Commission has persisted over the objection of Seatrain, in embracing both applications in a single certificate. This error became obvious when Division 4 reopened the case so as to "correct" Seatrain's certificate to conform to the alleged service methods which it had employed in the New Orleans service. Assuming arguendo that the New Orleans service was unnecessary and inefficient, Seatrain still was entitled to a certificate for that service. But it was not entitled to a certificate for the proposed service to Texas City unless the public interest required it.

At the hearing before the Commission the following colloquy took place between counsel for Seatrain and the presiding Commissioner:

> Mr. McCollester: May I say further, Mr. Commissioner,—and this is looking ahead rather than to the immediate situation here—that if we shall later go to hearing on this, I think the hearing ought to be—the two applications ought to be segregated for hearing.
>
> One is a Grandfather Clause application and the other is an application under the interim, calls for a

certificate of public convenience and necessity, and I think the issues are different, our proof would have to be different, and the record might be one that you would want them heard in such a way that there would not be any confusion as to the evidence in each.

Commr. Porter. Well, that ought to be easily handled.

Mr. McCollester: I should think it could be easily handled, too. (R. 332, 333)

Seatrain reiterates its objection to the confusion of the two applications and respectfully insists that there are no findings or any evidence to show that the public convenience and necessity require any service restrictions as to the New York-Texas City service. The Commission has attempted to impose the most severe restrictions upon Seatrain's New York-Texas City service, although imposing no restrictions whatsoever on the new certificate of the Newtex line covering a parallel route.

In so confusing the two applications the Commission has failed to perform its statutory duty and has imposed on Seatrain as to its New York-Texas City service, severe limitations without any evidence or any finding that the public would be benefited by converting Seatrain from a common carrier of commodities generally to a mere car ferry or "bridge" carrier. In fact, the Commission's action is contrary to its previous findings and to the specific finding referred to by Seatrain in its application that Seatrain is a "common carrier of commodities generally" as distinguished from a car ferry. *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215. In that proceeding the Commission found that Seatrain's method of operation "is not the method used in operating any other ferry here or elsewhere in the world. The nature of the service rendered, while similar, is not the same as that rendered by ferries". That being so, Division 4 held in its original decision here that Seatrain was entitled to a certificate as a common carrier of commodities generally. The "corrected" certificate is inconsistent with both findings and is not supported by any other findings, nor could it be on this record.

VII.

THE COMMISSION'S ACTION CANNOT BE DEFENDED ON THE THEORY THAT A CERTIFICATE IS AN "ORDER" AND IS SUBJECT TO THE PROVISION OF THE ACT EMPOWERING THE COMMISSION TO MODIFY ITS ORDERS.

Fully aware that it is without express statutory power to revoke a certificate, the Commission is driven to argue that section 315(c)* which authorizes the Commission to revoke or modify its *orders* can be interpreted in such a manner as to vest in the Commission the power to revoke the *certificate* of a common carrier by water.

The following is quoted from the argument before the court below:

> "Biggs, J.: Let us reduce it even more narrowly. Let us assume, *arguendo*, that they had not acted on it, that they had merely received it. Treat it from your angle. Where does the Commission get the power to revoke it?
>
> "Mr. Dumbauld: As I say, there are no decisions I know of on the point.
>
> "Biggs, J.: Well, is there any point in the law other than 315(c)?
>
> "Mr. Dumbauld: My argument is really simply one based upon public policy and the inherent power of any tribunal to correct errors and inadvertences. It seems to me, as the Commission has said, it would open the door to the assumption and exercise of powers which Congress has not granted if the Commission simply by making a mistake could validly do something in such a way that it could never be corrected or changed.

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* Section 315(c):

"The Commission may suspend, modify or set aside its orders under this part upon such notice and in such manner as it shall deem proper."

"Biggs, J.: It keeps bothering me a good deal, and that brings me to this second point: You really rely on 315(c), don't you? That is the only thing in the law.

"Mr. Dumbauld: The only thing in the law is that provision, that they may reconsider their orders." (R. 200)

It is a significant fact that in the part of the statute dealing with certificates of water carriers the word "order" is never used. There is a vast difference between an ordinary rate or regulatory order, on the one hand, and the franchise of a common carrier on the other. From the very nature of things, it is necessary to vest in the regulatory agency power to alter or amend from time to time its ordinary regulatory *orders*. Costs of transportation are forever changing; the volume of traffic fluctuates from year to year and even from month to month; the financial condition of all types of carriers changes for good or ill with general changes in economic conditions. As this brief is being written the railroads are appealing to the Interstate Commerce Commission for a 25 per cent increase in rates based on alleged increases in operating expenses of $1,800,000,000 since 1939. Regulation would be utterly impossible if the Commission were without authority to modify its rate and other regulatory orders from time to time with changes in conditions.

On the other hand, the franchise of a common carrier by railroad or of a common carrier by water is intended to be perpetual. It is believed that with the exception of temporary certificates issued under Section 311 of the Act, no certificate has ever been issued by the Commission except in perpetuity. It is always understood when a certificate is issued to a common carrier by water that substantial investments will be made under it and that it must be permanent if the necessary capital is to be forthcoming.

This latter point may well be stressed. Our merchant marine could never be developed in the manner contemplated by Congress if investors felt that rights granted in

a certificate issued under Part III could be substantially withdrawn at the whim of the Commission. The Court will take judicial notice of the fact that an operation like that of Seatrain between the North Atlantic and the Gulf requires millions of dollars to be invested. The necessary capital will be forthcoming only if the holders of certificates, like the holders of public utility franchises, can regard the rights granted as permanent. It is difficult to believe that Congress, which has taken so many steps to develop a strong merchant marine, did not have this point in mind in withholding from the Commission the right to revoke water carrier certificates although it had granted such right as to motor carrier certificates.

The government lacks confidence in its contention that a certificate is merely an order. The following is quoted from the record below:

> "Biggs, J.: . . . What language is there in the statute on which you rely and which would give the Commission the right to change its certificate now after it has been issued?
>
> "Mr. Dumbauld: Well, just the provision that relates to orders. As Mr. La Roe says, there may be a difference between an order and a certificate . . . " (R. 204).

Appellee deems it unnecessary to reply to the point on page 50 of appellants' brief to the effect that under the provisions of Section 17(7) the Commission may, after reconsideration, modify or reverse the decision of any individual Commissioner or board.

The Commission itself has recognized the difference between a certificate and an order in *Smith Bros. Revocation of Certificate*, 33 MCC 465 where the Commission said at p. 472 that a motor carrier certificate "once effective, may be terminated by us only on the conditions and according to the procedure, therein specifically provided. We may issue decision upon decision, *and order upon order* . . . but once a *certificate* duly and regularly issued becomes effective, our authority to terminate it is expressly marked off and limited." (Emphasis supplied)

VIII.

THE COMMISSION'S ACTION CANNOT BE DEFENDED ON THE GROUND THAT THE COMMISSION IS EXERCISING ITS AUTHORITY TO ATTACH TERMS AND CONDITIONS TO THE EXERCISE OF RIGHTS.

Obviously under section 309(d)* the Commission has authority to attach "terms, conditions and limitations" from time to time to the "*exercise* of the privileges granted." (Emphasis supplied) This was recognized by the court below. But the court below drew a distinction, which is manifestly sound, between attaching conditions to the *exercise* of the privileges granted, on the one hand, and *revocation* of the privileges themselves on the other. The language of the court below is:

> "The terms or conditions or limitations which may be imposed by the Commission under the authority of the section cited cannot sanction the radical step which the Commission has taken of transmuting a common carrier by water of commodities generally into a car-ferry." (R. 122)

The court doubtless had in mind that the Commission has the power to require a common carrier by water, within the scope of its certificate, to comply with regulations as to tariffs, as to the rendering of accounts, etc., to avoid discrimination, etc. But such power to attach conditions to the *exercise* of the rights is to be distinguished from the right to withdraw or destroy the rights themselves. Here the limitations are so severe that they would virtually destroy Seatrain, taking away three-fourths of its traffic. (R. 188).

The court below recognized that the Commission's action here, far from merely attaching conditions to the exercise

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* Page 76, *infra*.

of the certificate rights, changed the whole status of Seatrain. To quote from the opinion:

> "The amended certificate limiting transportation to property loaded in freight cars received from and delivered to rail carriers without transfer, in effect reduces Seatrain to the status of a car-ferry. It may not initiate or terminate traffic; it may not deliver freight to a truck or any receiver other than a railroad."

By its own admission the Commission sought here, not merely to attach conditions or limitations to the grant, but to change the grant itself so as to "establish substantial parity between future operations and prior bona fide operations." (Brief, p. 27). Taking the Commission's own premise, its action was intended to take away a substantial part of the original grant, which it deemed "too broad," as distinguished from merely attaching conditions to the *exercise* of the privileges granted.*

At page 24 of appellants' brief emphasis is laid on the fact that the original certificate was expressly subject to such limitations as the Commission may attach. It is hardly necessary to make the point that the Commission may not, by such a clause in a certificate, give itself powers which the statute does not give. Here the limitations are beyond the Commission's power because (a) they revoke a very substantial part of the original grant; (b) they relate to service methods over which the Commission has no jurisdiction.

Gemsco, Inc. v. *Walling*, 324 U. S. 244, relied upon by the government, is authority for the well-established proposition that where an agency is authorized by statute to impose terms and conditions in connection with its orders, it may impose such conditions as are necessary to achieve the purpose of the legislation. Here, however, the government attempts to impose conditions as to the service methods by

* The government makes the important admission (brief, p. 22) that "the modification here involved was restrictive, and to that extent a revocation *pro tanto* . . . "

which Seatrain shall conduct its transportation operations, which power Congress has not granted at all, and in addition it would impose terms and conditions which render useless additional facilities already purchased by Seatrain at Edgewater for the improvement of its service, in direct violation of the proviso in Sec. 309(d).

IX.

THE CLAIM OF INADVERTENCE IS NOT SUPPORTED BY THE RECORD.

Because of the emphasis which the government lays on alleged inadvertence it is necessary to appraise carefully and adequately the merits of that claim. Instead of showing inadvertence at the time of the original decision, the record shows a clear change in administrative policy *18 months later* and a contemporaneous attempt then, and for the first time, to reduce Seatrain to the status of a car ferry to conform to that change in policy—a reversal of position which the Court will find difficult to understand in view of the Commission's earlier finding, in a case addressed to that specific issue, that Seatrain is a general common carrier by water *as distinguished from a car ferry*. (*Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215)

Counsel for the government admits that the inadvertence "came up" when the *Foss case* was decided. The following is from the record in the court below:

> "Leahy, J. I understand that, but do you go so far as to say that they can ask them to come in and resubmit the data upon which they based their application under the grandfather clause in order to see if you made an inadvertence? In other words, did you arrive at the conclusion that there was inadvertence in this case prior to inviting Seatrain to come in and explain their position?
>
> "Mr. Dumbauld. Yes. The inadvertence, as I see it, came up when the Commission became aware by its decision in the Foss case that 'general commodities'

might not include freight cars. They there held that freight cars were not included under 'general commodities.' Well, if that is true it immediately becomes clear in the Seatrain case that Seatrain has not been granted all that it should have been granted." (R. 202-3)

It is important that we make clear the change in administrative policy which took place on December 18, 1943. Prior to that time it had been the policy of the Commission to issue to common carriers by water a broad and unrestricted type of certificate recognizing them to be common carriers of commodities generally and without prescribing the type of vessel or the service methods by which they might conduct their common carrier operations. Such an unrestricted certificate was issued not only to Seatrain but to all of its common carrier competitors, as the government concedes.* Uniformly in such certificates the applicant was authorized in broad terms "to continue in operation as a common carrier by self-propelled vessels in interstate or foreign commerce, in the transportation of commodities generally between" the ports involved. There was never any limitation as to the type of vessel except that as to common carriers engaged in towing barges the Commission used the expression "common carrier in the transportation of commodities generally by the use of *non-self-propelled* vessels with separate towing vessels between" etc.

A certificate of the latter type was issued on August 26, 1942, to Foss Launch & Towing Company, a common carrier towing company operating on Puget Sound. (*Foss Launch & Tug Co. Application*, 250 I. C. C. 817) Accus-

* The following took place at the hearing in the court below:

"Leahy, J.: Keeping in mind, if I might add to the question, that at the time the certificates were issued under the grandfather clause the same techniques were followed in issuing certificates to all other carriers.

"Mr. Dumbauld: Yes, I think there is no doubt of that, that the certificate issued to Seatrain was in the same form as was issued to all other carriers . . ." (R. 198)

tomed to towing barges containing any commodity whatever, Foss construed the broad language of its certificate as authorizing it to tow freight in railroad cars between railroad terminals, and it did so.

Foss had good reason to give a broad construction to its certificate because in an earlier case involving its subsidiary, Marine Oil Transport Company, operator of a car ferry, Division 4 was divided on the question whether a separate certificate was needed by the Marine company for its car ferry operations in view of the fact that Foss already had a certificate broad enough to cover its subsidiary's car ferry operations. No question was raised at that time about interpreting the Foss certificate as prohibiting the carrying of cars. Indeed, the subject is not even discussed in the decision.

Upon complaint by a car-ferry competitor the Commission reopened the Foss certificate case and, after hearing, held for the first time, on December 18, 1943, that a certificate issued to a common carrier by water to transport commodities generally does not include the right to perform car-ferry service.

It is not necessary for the purposes of the Seatrain case to decide whether the Commission was right or wrong in the *Foss case*. It is interesting to note that counsel for the government has doubts about the soundness of the decision:

> "Biggs, J.: Don't you think the original certificate is pretty broad, broad enough to carry the use of cars? . . . Do you feel that that is too narrow under the *Foss case* to include cars?
>
> "Mr. Dumbauld: It is under the *Foss case. Personally I am not sure that the Foss case was correctly decided by the Commission.*
>
> "Biggs, J.: You don't think that was a further inadvertence, do you?
>
> "Mr. Dumbauld: That would be improvident." (R. 204) (Emphasis supplied)

The Court will observe from the record that the alleged inadvertence was not discovered prior to December 18, 1943, when the second decision in the *Foss case* was rendered.*

It was on December 18, 1943, the very day of the second Foss decision, that the Commission reopened the Seatrain certificate proceeding and authorized the director of its Bureau of Water Carriers and Freight Forwarders to address a letter to counsel for Seatrain citing the second decision in the *Foss case* and transmitting a proposed report and a proposed "amended order" which would have had the effect of converting Seatrain from a common carrier of commodities generally to a mere car ferry.**

This was a great shock to Seatrain, not only because its unrestricted certificate had been in effect for a year and a half and large expenditures made in reliance on it, but because the Commission had specifically held in other proceedings that Seatrain was not a car ferry but a common carrier of commodities generally. Not only that, but the Commission knew full well and now concedes that Seatrain's operations went far beyond those of a car ferry. (Appellants' brief, p. 38) Specifically, the Commission concedes: (a) that Seatrain maintains its own stations reached only by truck and that it is entitled to reach such stations

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* The Commission now appears to concede (p. 8 of appellants' brief) that the reopening of the Seatrain proceeding was occasioned by the decision in the Foss case.

** The following is quoted from the letter written by the Bureau of Water Carriers and Freight Forwarders:

> "Enclosed is a copy of a report on reconsideration in W-587, *Foss Launch & Tug Co.* It will be noted that the certificate issued that company provided for 'the transportation of commodities generally.' Substantially the same wording was used in the certificate issued in that case and in W-543, your case.
>
> . . .
>
> "This leads directly to the further consideration of the wording of the certificate issued Seatrain Lines, Inc. Division 4 has reopened that proceeding for further consideration. It is thought that the enclosed copy of draft of report sets forth the reasons for issuing Seatrain Lines, Inc. an amended certificate and order." (R. 57)

(p. 38 of appellants' brief); (b) that Seatrain is entitled to handle lighterage traffic (*ibid.*); (c) that Seatrain's service is not limited to the points of rail interchange but covers other points in the port areas (R. 54); (d) that Seatrain freight must at times be transferred from railroad cars. (*Hoboken Divisions Case*, 234 I. C. C. 114, 124); and (e) that Seatrain's lighterage traffic is not interchanged with Hoboken Manufacturers Railroad, the only railroad with which Seatrain had physical connection at New York (*ibid.*, p. 122). In view of these admissions, and in view of the specific finding that Seatrain is a common carrier of commodities generally as distinguished from a car ferry (195 I. C. C. 215) it is impossible to understand the reasoning which led the Commission to convert Seatrain to a car ferry.

The distinctive characteristics of a railroad car ferry connecting two rail terminals is that it functions as a "bridge" carrier, receiving no freight from shippers, delivering no freight to consignees, interchanging no freight with trucks or lighters, maintaining no stations, and handling cars without transfer of freight. This would be Seatrain's exact status under the terms of the "corrected" certificate. This is a carrier which the Commission has for 13 years recognized as a common carrier of commodities generally, as distinguished from a car ferry, because "the nature of the service rendered, while similar, is not the same as that rendered by ferries." *Investigation of Seatrain Lines, Inc.*, 195 I. C. C. 215, 222. In this connection it is significant that a majority of the Commission's Division 4 disagreeing through all the years with the majority of the Commission, has considered Seatrain a car ferry. Thus 13 years ago Commissioner Mahaffie in his dissenting opinion in the case last cited described Seatrain as not a common carrier by water but as "an improved car ferry", and as a common carrier by railroad. (*ibid.* p. 234) Commissioner Miller, joining with Commissioner Meyer in a dissent in the same case, said, "If the Seatrain vessels . . . are car ferries, as I believe they are, we may control them

to the same extent that railroads are controlled . . ." (*ibid.*, p. 233) Commissioner Miller agreed with Commissioner Mahaffie that Seatrain was a common carrier by railroad operating a car ferry.

At least so far as Division 4 is concerned, therefore, which first made the claim of "inadvertence" in the issuance of the original certificate, we face the unpleasant fact that while the certificate originally issued was in complete conformity with the views of the majority of the Commission over a period of 13 years, the "corrected" certificate reflected a dissenting view which the majority of Division 4 had long entertained. Their "inadvertence" consisted of issuing originally to Seatrain a certificate which accorded it the status of a common carrier by water which a majority of the Commission had recognized in at least 7 decisions.* The confusion of the Commission is obvious. It reopened the Seatrain case in order to make the Seatrain certificate conform to its past operations. The Commission had held over a long period of years that its operations were those of a common carrier of property generally by water as distinguished from a car ferry. Division 4, a majority of whose members had considered Seatrain a railroad car ferry, thereupon proceeded to issue a certificate converting Seatrain into a railroad car ferry and claiming that its original action, which conformed with the majority views over a long period of years, was inadvertent.

Whatever may have been the reasoning, the action was *deliberate*, and it resulted from the aforesaid change in administrative policy in the *Foss case*. There is, we submit with all deference, no escape from the conclusion that on December 18, 1943, Division 4 of the Commission, having in mind its decision in the *Foss case*, decided at least tentatively that the Seatrain certificate would have to be re-

* The decisions referred to are those cited by Commissioner Lee at page 40 of the printed record.

duced to a car-ferry basis; that it caused a letter to that effect to be written to counsel for Seatrain; that it reopened the proceeding for the purpose of so restricting the Seatrain certificate, later assigning the matter for hearing and inviting Seatrain to be present. This course of action proves, not inadvertence, *but a deliberate procedure designed to restrict Seatrain to a car-ferry operation.*

Our conviction on this point is confirmed by the able dissenting opinion by Commissioner Lee (R. 40) in which he shows with unerring logic why there could not possibly be inadvertence.* Says he:

> "The division's action in reopening this proceeding more than 18 months after the certificate had been regularly issued was not due to the filing of any request therefor on the part of Seatrain or any of its numerous competitors. On the contrary, the proceeding was reopened by division 4 on its own motion solely because the division changed its mind as to the quantum of authority it should have issued to Seatrain. On December 18, 1943, on reconsideration in Foss Launch & Tug Co. Applications, 260 I. C. C. 103, division 4 amended the certificate issued to the Foss Company on August 26, 1942, which authorized transportation of commodities generally, by eliminating therefrom authority to transport 'freight cars, loaded or empty, in the performance of a freight-car ferry service.' To justify this action the division held that the certificate issued to the Foss Company did not include the right to engage in freight-car ferry service. On the same day on which it issued the amended certificate to the Foss Company, the division reopened the instant proceeding for reconsideration and directed our Bureau of Water Carriers and Freight Forwarders to call Seatrain's attention to its action on reconsideration in the Foss case and to suggest that Seatrain's certificate be amended so as to restrict the authorized operations to the transportation of liquid cargoes in bulk, of empty railroad cars, and of prop-

* The quality of Commissioner Lee's dissent is such as to commend it highly. Commissioner Lee was formerly Chief Justice of the Supreme Court of Idaho.

erty loaded in freight cars received from and delivered to rail carriers without unloading such property from the freight cars. Seatrain opposed such amendment of the certificate. Thereupon, on January 27, 1944, division 4 reopened this proceeding for hearing.''.

• • • • • • • • • •

''On December 5, 1944, the Commission affirmed the action taken by the division, on reconsideration, in the Foss case. I dissented because I felt that we were without power to change, amend, or revoke in part, the certificate issued to the Foss Company on August 26, 1942, without its consent and that, in any event, 'transportation of commodities generally' should embrace transportation of all classes of property, including railroad cars, loaded or empty.

''It seems appropriate here to point out that Seatrain contends, and the record indicates, that it transported various commodities in port-to-port service, on its own billing, which were not 'loaded in railroad cars received from and delivered to rail carriers and transported without transfer from railroad cars.' In *Hoboken Mfrs. Co.* v. *Abilene & S. Ry. Co.*, 248 I. C. C. 109, at page 113, we found that:

> 'Moreover, the evidence shows that Seatrain does move a very substantial number of empty cars, routing them preferably by Havana in the hope that there they may pick up loads. It is also shown that a large volume of traffic via Seatrain originates or terminates at the ports, and that a supply of cars for traffic so originating is there maintained at Seatrain's expense.'

''The reports of our investigation of Seatrain disclose that it leased cars from private car companies.

''As stated in the report of the majority, there is no intimation of fraud or misrepresentation on the part of applicant. This proceeding was reopened by division 4, on its own motion, for the reasons stated above. In my opinion, we cannot fairly find that the certificate issued to Seatrain on July 2, 1942, and which has been in effect since that time without objection

from anyone, was inadvertently issued. On the contrary, it was duly and regularly issued in accord with the findings of the division. Not having been issued through inadvertence, we are without power to change, or amend, or revoke it, in whole or in part, without Seatrain's consent. A certificate is something more than a mere revocable license. It is similar to a franchise." (R. 41-44)

Commissioner Alldredge, dissenting, said:

"The certificate issued to applicant in this instance was in conformity with the findings, and so far as the report of Division 4, which issued the certificate, discloses, the findings were not the result of inadvertence or oversight, but were the product of a deliberate exercise of judgment." (R. 50-51)

It is not necessary to labor the point because counsel admitted (R. 203) that the inadvertence "came up when the Foss case was decided." The Foss case, of doubtful validity even in the opinion of government counsel, (R. 204) laid down a new adminstrative interpretation of the meaning of "common carrier of commodities generally." The so called inadvertence was in reality an attempt to make this new and doubtful interpretation retroactive as to Seatrain, although its rights under the certificate had long since become vested.

Impossibility of Inadvertence as to the New York-Texas City Operation.

Since the application for the New York-Texas City service involved no grandfather rights, being an application based solely on public convenience and necessity, the Commission finds itself in the impossible position of having changed such certificate without evidence and without any showing that the public convenience would be served by the restrictions imposed. As previously explained, the combined certificate issued to Seatrain was identical with those issued to its competitors, including that issued to Newtex

Line, as a common carrier of commodities generally between New York and the ports of Brownsville and Houston on January 11, 1945, three weeks before the "correction" of the Seatrain certificate. *Newtex S. S. Corporation Common Carrier Application,* 260 I. C. C. 418. Thus, all of Seatrain's competitors, both established lines and newcomers to the trade, are given the full grant as common carriers of commodities generally. Only Seatrain is to be limited. The "correction" of the Seatrain certificate was admittedly based on the old record. (R. 343) The Commission now claims that it was "inadvertent" in not placing the restrictions on Seatrain when the original certificate was issued. Since there is no evidence to support its later action, and since its original action was in exact conformity with all its previous decisions in such matters, there was no inadvertence.

On the contrary, the Commission found on January 11, 1945, that the public was in need of additional service by common carriers by water of commodities generally and granted a certificate for such service to the Newtex Line on the condition that Newtex would purchase a vessel and institute service before December 31, 1945. Three weeks later, the Commission "corrected" Seatrain's "Texas City" certificate in such manner that the public would be deprived of the services of Seatrain's vessels. The public's loss of the services of these large and versatile Seatrain vessels would be many times greater than the gain from the services of the Newtex vessel. The Commission's action, therefore, in restricting the Seatrain vessels to car-ferry service, only three weeks after issuing the certificate to Newtex, was contrary to its own findings in that case also.

What caused this grotesque result is clear. The Commission, over repeated protests by Seatrain, combined the New York-Texas City application (based on public convenience and necessity) with the New York-New Orleans application, (based on grandfather rights) in such a manner as to reverse the former finding and to hold that the public

will be better served by restrictions than without them. The Commission's decision will be searched in vain for a finding that the public convenience and necessity will be better served if the Seatrain certificate is limited to a pure car-ferry basis. It was only by combining the two certificates that such an indefensible result could have been reached.

In the light of the foregoing facts there is no escape from the conclusion of Commissioners Lee and Alldredge that the action of the Commission was deliberate and not inadvertent.

X.

IT WOULD HAVE BEEN INAPPROPRIATE FOR SEATRAIN TO INTRODUCE NEW EVIDENCE AT THE HEARINGS BEFORE THE COMMISSION.

At page 3 of the government brief the statement is made that Seatrain "repeatedly declined to introduce that (evidence as to reliance) or any other evidence before the Commission at the modification hearings."

The truth is that Seatrain was never invited to introduce additional evidence. The Commission stated that it desired to correct the certificate to conform to the facts of record in the light of the new interpretation given in the *Foss case*. Since Seatrain is a common carrier by water subject to the Commission's jurisdiction the Commission could have subpoenaed any evidence that was pertinent. Not only did it not do so, but it did not go beyond inviting Seatrain to reply to Director Girault's letter of December 31, 1943 (R. 57). Seatrain not only replied to the letter in detail, pointing out the errors in the proposed description of Seatrain's service (R. 61) but it showed by affidavit its reliance upon the original certificate, and again protested the combining of the two certificates. (R. 76)

Because of the trenchant criticism of Seatrain for its alleged "refusal" to introduce new evidence a brief review of the facts is necessary.

About one week after Seatrain's reply to the said letter, Division 4 of the Commission issued a further order reopening the proceeding:

> "for hearing upon the question of whether or not the said findings and certificate and order of July 2, 1942 should be modified so as to authorize applicant to continue to operate in service in which it was engaged, except for interruptions beyond its control, namely, as a common carrier by the "Seatrain" type of vessels in the transportation of liquid cargoes in bulk; of empty railroad cars, and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from the freight cars between the ports above mentioned." (New York, New Orleans and Texas City.) (R. 68)

As more fully set out in the Statement of the Case (p. 4, *ante*) the Commission duly assigned the matter for hearing and appellee filed a motion (R. 69) praying that the Commission's order reopening the matter be vacated on the ground that appellee had incurred substantial expense and had made important commitments pursuant to and in reliance upon the certificate as originally issued and that the Commission was without authority to cancel, alter or amend said certificate so as to revoke or restrict the rights, authorization and privileges held by appellee thereunder, and that any attempt so to do would take appellee's property without due process of law. Appellee again prayed for a severance of the two certificates and warned the Commission of its lack of statutory authority to prescribe the service methods of water carriers. When the matter was called for hearing counsel for appellee renewed the motion (R. 329) that the Commission vacate and rescind its order reopening the proceeding. The presiding Commissioner overruled the motion (R. 331) and an appeal was taken by counsel to the full Commission (R. 333) on the same grounds. Prior to the hearing there was filed the aforesaid affidavit of Graham M. Brush, appellee's president, that appellee, "in reliance upon the certificate, has made substantial expenditures and commitments and, among other

things, has reacquired title from the United States to four vessels . . . Seatrain Lines, Inc. would not have made these expenditures nor entered into the commitments if it had reason to believe that the Commission would or could reopen the proceeding upon its applications for the purpose of changing . . . the certificate by including therein any new terms, conditions or limitations designed to have the effect of altering the operating rights . . ."

By order dated April 3, 1944, the Commission overruled appellee's motion (R. 78). A petition for reconsideration was denied and the matter was again assigned for hearing on April 24, 1944, at which time counsel for appellee appeared for the purpose of challenging once more the jurisdiction of the Commission to revoke the privileges granted after reliance thereon by the grantee. Counsel advised the Commission that appellee did not concede and would challenge the Commission's jurisdiction to do what it proposed. (R. 338). The presiding Commissioner announced that the Commission would have before it and would take into consideration the cases referred to by appellee in its applications and incorporated therein, and that the Commission would also have before it appellee's applications and all of the material and supporting documents filed by appellee in support of its applications, either at the time said applications were filed or subsequently thereto, together with the correspondence with the Director of the Commission's Bureau of Water Carriers and Freight Forwarders (R. 341-3). Thereupon the following colloquy took place place between counsel for respondent and the presiding Commissioner:

> "Mr. McCollester: * * * If I correctly understand, all of the material to which Your Honor has referred, is material which was presented in connection with the applications considered by the Commission in issuing its order of July 2, 1942 which contains certificate and was the material upon which that certificate was based. If that clearly appears, of course, we, ourselves, would want that. We want to have that clearly understood. The only objection we would have to the consideration by the Commission at this time, or the re-

ceipt for purposes of consideration of any evidence or material of any sort in the nature of factual information which was not before the Commission and was not considered by it in issuing the certificate.

Commr. Porter: Well, Counsel understands of course that the reports of the Commission to which I have referred and identified in the record here, were all matters of our records and were before us at the time, and were available to us at the time we issued the certificates.

Mr. McCollester: That is right.

Commr. Porter: And that is also true of these offers I have just made of documents and letters directly connected with at the time of your application. They are all in the docket and they are, of course, subject to inspection and examination by respondent's Counsel at any time.

Mr. McCollester: Yes, and of course, Mr. Commissioner, we take the position that the certificate was issued in the light of all of the facts disclosed thereby." (R. 343)

In view of the foregoing, and because of appellee's contention, to which it now adheres, that the Commission was without jurisdiction to hold hearings as a basis for revoking and modifying the certificate, appellee had no evidence to offer, especially since it was agreed that this would be a test case and that it would be decided on the facts of record.

If the Commission felt the need of additional evidence it would not have prepared a proposed report, and a proposed corrected certificate (R. 58-61) in advance of the hearing. In assigning the case for hearing it requested no new evidence of any party, and the presiding Commissioner made it plain that the Commission would decide the case on the record. One wonders why the case was set for hearing under these circumstances. Be that as it may, it would clearly have been inappropriate for Seatrain to introduce new evidence under such circumstances and in the absence of any request for new evidence by the Commission and in view of Seatrain's conviction that the Commission was utterly

without statutory power or right under the Fifth Amendment to take the action proposed. It did, however, warn the Commission of the errors in Director Girault's letter, of its lack of jurisdiction, of Seatrain's reliance upon the original certificate and of the impropriety of combining the two certificates.

The government's argument on this point rests on confusion between the purpose of the further hearings and the nature of the evidence subsequently presented to the District Court. The correspondence between the Commission and counsel for appellee shows clearly that the whole purpose of the further hearings was to consider the Commission's proposal that the certificate should be "corrected". But further than this, the evidence introduced in the lower court was not evidence which would have been appropriate or proper for consideration by the Commission in the exercise of its administrative functions. If it be assumed, for the sake of argument, that the Commission had authority to modify its order and "correct" the certificate issued, the only evidence which would have been proper would have been evidence directed to the Commission's action in this regard. As to the "grandfather" certificate, evidence concerning the action of Seatrain in 1945 could have no possible relation to any question as to the nature of the rights to which Seatrain was entitled, which depended upon its business and activities in 1940. With respect to the Texas City certificate, which rested upon a finding of public convenience and necessity, the Commission's order of reopening certainly did not invite any new evidence upon the public interest question because the Commission's order reopening the matter, when read in connection with all the surrounding circumstances, plainly indicated that the Commission was concerned only with whether the original certificate was responsive to the previously offered proof and to the Commission's findings in earlier cases.

The evidence presented to the court, on the contrary, was with regard to Seatrain's reliance upon the original

certificate. This evidence had absolutely no relation to grandfather rights or to public interest. That is to say, the proof offered in the court below was in no sense addressed to the Commission's administrative authority but dealt solely with the question whether, after the Commission had purported to exercise its administrative authority, its action in so doing would cause injury to Seatrain and whether Seatrain had, by acting in reliance upon the original certificate, accepted it.

Moreover, it is incorrect to say that the Commission had no knowledge of the situation, for Seatrain filed a motion to discontinue the further proceedings and dismiss the order of reopening, and in connection therewith presented in support of such motion an affidavit setting forth briefly the action taken in reliance upon the Commission's original order. It must be apparent that any evidence offered by Seatrain at the modification hearings as to the effect of the proposed "corrected" order upon Seatrain and the grave injury to Seatrain would have had no relation either to Seatrain's grandfather rights or to the question of public convenience and necessity. Hence such evidence was not appropriate for presentation to the administrative agency.

The cases cited in the government's brief are not in point, because the evidence there discussed was evidence relating to administrative matters. Had appellee offered evidence to the lower court as to its operations during the grandfather period, or as to public interest in Seatrain's New York-Texas City service, without first having presented such evidence to the Commission, the government's position here would be well taken.

Furthermore, even if the court below should not have received the evidence, its action in so doing did not render valid the Commission's order if the order was in fact in excess of the Commission's statutory authority, as Seatrain contends, and therefore, in any event, the injunction granted should not be set aside.

XI.

EVIDENCE AS TO APPELLEE'S RELIANCE UPON THE ORIGINAL GRANT AND OF THE DEPRIVATION OF PROPERTY UNDER THE "AMENDED" CERTIFICATE WAS PROPERLY RECEIVED IN THE COURT BELOW.

Since deprivation of property under the amended certificate is solely a constitutional question, the court below held that evidence as to the loss and injury to appellee caused by the cancellation of the original certificate and the substitution of the amended certificate was properly admissible. (R. 125.)

There is not involved here any question as to the introduction of evidence in the administrative category. The record before the Commission was complete and it called for no additional data, nor did any party introduce any. Nor did Seatrain introduce in the court below any new evidence except that dealing with its reliance upon the original certificate and the extent to which it would be deprived of property if its status were changed as proposed by the Commission.

At the hearing in the court below appellee offered the testimony of witness Graham M. Brush, president of Seatrain Lines, Inc., for the purpose of proving that appellee had substantially relied upon the certificate originally issued and that cancellation of the original certificate would operate to the serious disadvantage and injury of appellee and deprive it of property without just compensation and without due process of law in violation of the Fifth Amendment. The nature of appellee's expenditures and commitments is explained in a preceding chapter of this brief. (*ante*, p. 41).

Appellee's evidence as to reliance was received by the court below subject to the government's motion to strike, it being the government's position that the court might not receive evidence, even as to appellee's deprivation of prop-

erty, in addition to the evidence before the Commission. The court denied the government's motion and the evidence was admitted. The court below held on this point as follows (R. 125):

> "The testimony introduced by the petitioner showing its expenditure of funds and its large commitments in reliance upon the original certificate will not be stricken from the record. The petitioner has alleged that the Commission's order will deprive it '. . . of property and take its property for public use without just compensation and without due process of law in violation of the Fifth Amendment . . .'. The evidence referred to is pertinent to the question, one of mixed law and fact, raised by the petitioner. The testimony objected to supports the conclusion that the petitioner will be deprived of property without compensation and without due process of law if the order of the Commission shall become effective. See *B. & O. R. Co.* v. *United States*, 298 U. S. 349, 368-9, and *United States* v. *Idaho*, 298 U. S. 105, 108-9. See also Commissioner Porter's statement, note 5 supra."

The evidence on the subject of reliance introduced in the court below was directed exclusively to the *judicial question* which under the statute and under the Constitution is left for determination by the courts.

The decisions of this Court in *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 368-369, and in *United States* v. *Idaho*, 298 U. S. 105, 108-109, are clear authority for the admission of additional evidence, beyond that in the record before the Commission, as to constitutional and jurisdictional issues and all similar issues which are properly the subject of judicial, as distinguished from administrative, determination.

In the *Baltimore and Ohio case* plaintiff railroads had introduced additional evidence in the district court for the purpose of proving that the order of the Commission had prescribed divisions so low as to deprive them of property without just compensation. The Court after an extended examination of the question affirmed the right of the

railroads to an independent judicial determination of the constitutional question and affirmed the right of plaintiffs to introduce evidence in the district court *for the first time* on the issue of confiscation. The Court said (pp. 368-369):

> "The due process clause assures a full hearing before the Court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

In the present case appellee charges that the revocation of its original certificate deprives it of property and takes "its property for public use without just compensation and without due process of law, in violation of the Fifth Amendment of the Constitution of the United States." Appellee's additional evidence was tendered in support of this constitutional allegation only and was not addressed to any administrative issue. To deny to appellee the opportunity to present evidence in support of the allegation on the constitutional point would operate to defeat appellee's constitutional rights. The enforcement of constitutional rights is purely a judicial function and the exercise of that function may not be limited or impaired by depriving the courts of the right to receive evidence *de novo* bearing solely upon the judicial question.

An analogous case is *United States* v. *Idaho, supra.* There the question was whether by the order in question the Commission had sought to exercise a power which it did not possess. Here the issue relates to the revocation of a certificate. In the *Idaho case* it related to the Commission's power to authorize the abandonment of an intrastate railroad spur. The statute specifically exempted the abandonment of "spur, industrial, team, switching or side tracks, located . . . wholly within one state." The issue was carefully considered by this Court and we take the liberty of quoting from the decision of the Court speaking through Mr. Justice Brandeis (108-109):

"The case was heard before three judges. The sole controversy was whether the trackage was a 'spur' or 'industrial track'; and, therefore, excluded from the jurisdiction of the Interstate Commerce Commission. The record made before the Commission was introduced in evidence; also some testimony 'which merely amplified evidence already in the record.'"

* * * * * * * * *

"The District Court concluded that the Talbot branch was constructed and has been maintained for the purpose of serving a single industry; that practically no other industry is served; that this trackage does not invade new territory; that its continued operation or abandonment is of local and not of national concern; that it is therefore a 'spur;' and hence, that the order of the Interstate Commerce Commission was in excess of its jurisdiction. The court annulled the order and enjoined its enforcement. 10 F. Supp. 712."

"The decree should be affirmed, because on findings amply supported by the evidence the trackage is a spur. Appellants object that, since the findings and order of the Interstate Commerce Commission were made on substantial evidence, they are conclusive, and that it was error to admit the testimony first offered in the District Court. Compare *Tagg Bros.* v. *United States*, 280 U. S. 420, 444, 74 L. ed. 524, 537, 50 S. Ct. 220. Although it would have been better practice to have introduced all relevant evidence before the Commission, as appellees' counsel concede, the court did not err in admitting the additional testimony. For whether certain trackage is a 'spur' is a mixed question of fact and law left by Congress to the decision of a court—not to the final determination of either the federal or a state commission."

On brief, the government cites the decisions in *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426, *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, and *National Broadcasting Company* v. *United States*, 319 U. S. 190.

The *Tagg Bros. case* was a suit to enjoin an order of the Secretary of Agriculture prescribing a tariff of maximum

charges for market agencies at the Omaha stockyards. A special master was appointed by the lower court to hear evidence and report his conclusions to the court. The master admitted, in addition to the record before the Secretary, oral evidence which, in condensed form, occupies 84 pages of printed record and 24 elaborate exhibits. Upon final hearing before the court, the additional evidence was held admissible and an injunction issued. In discussing the admissibility of additional evidence in the court proceeding Justice Brandeis, speaking for a unanimous Court, said:

> "... The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—*save as there may be an exception of issues presenting claims of constitutional right*, a matter which need not be considered or decided now. *Louisville & N. R. Co.* v. *United States*, 245 U. S. 463, 466; 66 L. ed. 400, 405; 38 Sup. Ct. Rep. 141. Compare *Liscio* v. *Campbell* (C. C. A. 2nd) 34 F. (2d) 646, 647. And See *Prendergast* v. *New York Teleph. Co.*, 262 U. S. 43, 50; 67 L. ed. 853, 858; 43 Sup. Ct. Rep. 466, and *Ohio Valley Water Co.* v. *Ben Avon*, 253 U. S. 287, 289; 64 L. ed. 908, 914, P.U.R. 1920E, 814, 40 Sup. Ct. Rep. 527 ..." (Emphasis supplied)

This Court, in upholding the validity of the Secretary's order, found it unnecessary to rule upon the question of admissibility of the additional evidence and passed the question; however, the principle that evidence bearing upon claims of constitutional right may be introduced in court was reaffirmed.

In addition to the rule that evidence may be received *de novo* in court on issues presenting claims of constitutional right, the *Tagg Bros. case* is also authority for the familiar rule that on questions which have been lodged with the Commission for final determination, the courts will consider only the record before the Commission. Inasmuch as appellee's additional evidence is tendered in support of the contention that the revocation of its original certificate de-

prives it of property in violation of the Fifth Amendment, and the question presented is clearly one upon which an independent judicial determination is to be made, the latter rule can have no application here.

Acker v. *United States; supra,* involves substantially the same facts and issues as the *Tagg Bros. case* and arose following the fixing by the Secretary of Agriculture, acting under the Packers and Stockyards Act, of maximum reasonable rates to be charged by market agencies doing business at the Union Stockyards in Chicago. The district court on final hearing dismissed the bill seeking an injunction against enforcement of the Secretary's order, saying:

> "Having considered the new evidence offered for the first time in this court, and all the evidence before the Secretary, and having concluded that there is no showing of confiscation, we find it unnecessary to determine whether the evidence offered for the first time in this court was admissible."

In the unanimous opinion of this Court, delivered by Mr. Justice Roberts, it was said that "It is to be noted that in spite of the allegations of the bill the case does not involve any question of confiscation." This being so, and in the absence of any other claim of constitutional right, appellee cannot perceive what possible bearing the *Acker case* can have here except to the extent that it supports appellants' erroneous reliance upon the familiar rule regarding review of findings of fact. Here again appellants seek to apply a rule which has been expressly held to be inapplicable to situations where a claim of constitutional right is asserted.

Shields v. *Utah Idaho R. Co., supra,* presented an inquiry into the scope of judic[illegible] review of a determination by the Interstate Commer[illegible] ommission, for purposes of the Railway Labor Act. [illegible] respondent was not an interurban electric railwa[illegible] this case, like the *Acker case,* involved no constitut[illegible]al or jurisdictional questions and hence is not pertinent. Mr. Chief Justice Hughes made plain the distinction between the principle involved in the

Shields case and that urged for appellee herein as announced in *United States* v. *Idaho, supra,* saying:

> "As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except interurban carriers as it saw fit, *no constitutional question is presented* calling for the application of our decisions with respect to trial de novo so far as the character of respondent is concerned. With respect to that question, *unlike the case presented in United States* v. *Idaho,* 298 U. S. 105, 80 L. ed. 1070, 56 S. Ct. 690, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (Id. p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority. (Emphasis supplied) (184-5)

Thus it will be seen that in the *Shields case* Congress, in the exercise of its constitutional powers, had decreed that the Interstate Commerce Commission, after hearing, was to determine the character of respondent. On that issue a court might not hear evidence unless it be urged that the Commission's determination is unsupported by evidence or is arbitrary or capricious. Decision as to the character of respondent is specially reserved by the Congress for the administrative agency. But in the case at bar a constitutional question *is* presented, to paraphrase the language of Mr. Justice Brandeis in *United States* v. *Idaho, supra,* which is "left by Congress to the decision of a court, not to the final determination of a federal commission."

In *National Broadcasting Co.* v. *United States,* this Court held that in reviewing certain regulations adopted by the Federal Communications Commission relating to granting of radio broadcasting licenses by that Commission, review by the Courts is limited to "the evidence before the Commission." The *Tagg Bros. case* and the *Acker case* are cited

as authority for the rule. It is apparent therefore that the *National Broadcasting Co. case* is but another decision in support of the familiar principle that the courts will not receive additional evidence on matters solely within the jurisdiction of the administrative agency. Appellee has no quarrel with the government as to the validity of the familiar principle in the cases last cited, but appellee is at a loss to know why these cases are cited in a case where only a judicial question is presented and where the factual record is complete.

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, relied upon by the government, supports the familiar rule that a party must exhaust his administrative remedy before applying to the courts. In that case the National Labor Relations Board had issued a complaint against the Bethlehem Company charging it with unfair labor practices. The Bethlehem Company sought and obtained an injunction against the holding of the hearing. This Court held that Congress had vested in the Board exclusive jurisdiction to hear and determine the facts and that the courts were without power to consider the matter except after hearing before the administration agency and upon appropriate judicial review. In the present case the questions for determination are purely judicial.

United States v. *Hancock Truck Lines*, 324 U. S. 774, is relied upon to support the proposition that Seatrain's alleged "failure to produce evidence" amounts to "an acquiescence on the facts" and that Seatrain is now estopped to produce evidence "which it refused to present to the Commission." In the first place, the Commission did not request Seatrain to produce any evidence, so there could have been no refusal. In the second place, Seatrain is quite willing to be bound by the facts of record in this case which show that even on a grandfather basis Seatrain had four times as many rights as are recognized in the corrected certificate. (R. 188) Seatrain relies here on the same record which the Commission indicated its willingness to

rely on at the modification hearings, namely, the facts in Seatrain's applications and accompanying exhibits and the decisions in certain previous Seatrain cases incorporated in this record. It is those facts upon which the Commission claims to have relied in limiting the certificate, and it is those facts upon which Seatrain relies to prove that the Commission withdrew three-fourths of the rights originally granted.

CONCLUSION.

Since the Commission is without statutory power to cancel and modify the certificate as proposed, and since appellee would be deprived of property in violation of the Fifth Amendment by such modification, the action of the court below setting aside and annulling the order of the Commission should be affirmed. The case should not be remanded to the Commission for clarification of its order, as suggested by the government (p. 39 of brief) because to do so would imply that appellee's certificate rights may be curtailed in spite of its reliance on the original grant and because no clarification is possible as to the New York-Texas City service inasmuch as the original certificate granted as to that service was based on a showing of public need, as the Commission duly found, and there have been no findings as a predicate for a different conclusion. There is, therefore, nothing regarding the New York-Texas City certificate to be clarified.

Respectfully submitted,

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APPENDIX A.

Sec. 309(a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. Pending the determination of any such application, the continuance of such operation shall be lawful. If the application for such certificate is not made within one hundred and twenty days after this section takes effect, it shall be decided in accordance with the standards and procedure provided for in subsection (c), and such certificate shall be issued or denied accordingly. Any person, not included within the provisions of the foregoing proviso, who is engaged in transportation as a common carrier by water when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate, and, if application for such certificate is made to the Commission within such period, the continuance of such operation shall be lawful pending determination of such application.

Sec. (b) Application for a certificate shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulations, require.

Sec. 309(c) Subject to section 310, upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied:

* * * * * * * * *

Sec. 309(d) Such certificate shall specify the route or routes over which, or the ports to and from which, such carier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

APPENDIX B.

Sec. 212(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commis-

sion, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210(a), may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

p. 7, 8

SUPREME COURT OF THE UNITED STATES

No. 61.—October Term, 1946.

United States and Interstate Commerce Commission, Appellants, v. Seatrain Lines, Inc.	Appeal from the District Court of the United States for the District of Delaware.

[January 6, 1947.]

Mr. Justice Black delivered the opinion of the Court.

Seatrain is and long has been a common carrier of goods by water. Its harbor facilities and vessels have been constructed to enable it to perform a distinctive type of water carriage. Loaded railroad cars can be hoisted and transported in its vessels, thereby eliminating such things as trouble, time and breakage, said to be incident to loading and unloading goods from railroad cars. See *United States* v. *Pennsylvania R. R.*, 323 U. S. 612. Seatrain vessels also have tank space for carriage of liquid cargoes in bulk.[1]

Part III of the Interstate Commerce Act, 54 Stat. 929, 49 U. S. C. § 901, *et seq.*, subjected water carriers to the jurisdiction of the Interstate Commerce Commission. Section 309 (a) of that Act required them to obtain certificates of public convenience and necessity from the Commission. The same section contains a proviso commonly referred to as the grandfather clause. It provides that any water carrier, with an exception not here material, which was in bona fide operation as a common carrier by water on January 1, 1940, shall be entitled to a certificate to continue operations over the route or routes which it had been serving previous to that date without determination by the Commission of the question of public convenience and necessity.

[1] For a description of Seatrain equipment, see Investigation of Seatrain Lines, Inc., 195 I. C. C. 215, 218–222.

May 28, 1941, Seatrain filed two applications with the Commission to obtain certificates for two different routes, one of which it had operated since 1932, and another which it had begun to operate in 1940 shortly after passage of the water carrier provisions. Seatrain's application described its operation on each route as that of a "common carrier by water of commodities generally." After due notice had been given to all interested parties, Division 4 of the Commission conducted investigations, satisfied itself as to the right of Seatrain to be granted both applications under the provisions of the Act, made appropriate findings, and concluded that Seatrain was entitled to engage in transportation on both the routes as "a common carrier by water of commodities generally." A single certificate to carry "commodities generally between the ports of New York, New Orleans, and Texas City, by way of the Atlantic Ocean and the Gulf of Mexico" was accordingly issued to Seatrain. By its terms it became effective August 10, 1942, subject "to such terms, conditions, and limitations as are now or may hereafter be, attached to the exercise of such authority by the Commission."

A year and a half later, January 27, 1944, the Commission, on its own motion, ordered that the proceedings be reopened for the purpose of determining whether the 1942 certificate should not be modified so as to deprive Seatrain of the right to carry commodities generally. Seatrain appeared and moved to vacate and rescind the Commission's order to reopen the proceedings on the ground that the Commission was without statutory authority to make the alteration proposed. Seatrain's motion was rejected. At the subsequent hearing on the proposed modification, Seatrain declined to offer evidence, resting its case entirely on the Commission's lack of authority to reconsider and alter the original certificate. After argument, the Commission entered an order canceling the former certificate and directing that a different one be issued. 260 I. C. C.

430. The proposed new certificate in effect deprived Seatrain of the right to carry goods generally between the ports it served, and limited it to operations only "as a common carrier by the 'Seatrain' type of vessel, in interstate or foreign commerce, in the transportation of liquid cargoes and bulks; of empty railroad cars; and of property loaded in freight cars received from and delivered to rail carriers and transported without transfer from freight cars between the ports of New York, N. Y., New Orleans, Louisiana, and Texas City, Texas."

Seatrain then brought this action before a three-judge District Court under 28 U. S. C. §§ 41 (28), 47, to set aside the Commission's order. The District Court set aside the order on the ground that the Commission had exceeded its statutory authority in reopening the proceeding and altering the certificate. The District Court further held that even if the Commission would have had power under different circumstances to alter a certificate, it should not have done so in this case where, as the Court found from evidence before it but which had not been before the Commission, Seatrain had expended large sums of money in reliance upon the complete validity of its certificate. 64 F. Supp. 156. We need not consider the Commission's objection to the District Court's admission of evidence not heard by the Commission since we agree with the District Court that the Commission was without authority to cancel this certificate.

In altering Seatrain's certificate, the Commission held that a certificate authorizing the carriage of "commodities generally" does not embrace the right to carry loaded or unloaded railroad cars; that consequently the original certificate granted Seatrain actually deprived it of any future right to carry railroad cars—its chief business; that issuance of the original certificate to carry commodities generally was consequently an inadvertent error patent on the face of the record which the Commission has the right

and power to change at any time the matter comes to its attention. But Seatrain argues that, far from restoring the right to which it was entitled under the original proceedings, the new order actually results in a drastic limitation on the nature of the equipment and service Seatrain is privileged to employ in loading and carrying freight, and could bar delivery or receipt of freight to or from any consignees except railroads.

We need not determine the Commission's statutory power to correct clerical mistakes, since we are persuaded from Seatrain's applications for its certificates, from the information supplied to the Commission indicating that Seatrain had long transported goods of all kinds loaded in freight cars to consignees other than railroads, from the findings of the Commission, and from the course of the earlier decisions of the Commission regarding Seatrain, that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct. For all these indicate that prior to and at the time of the issuance of the Seatrain certificate it was the understanding of Seatrain and the Commission that its transportation of "commodities generally" included carriage of freight cars and that carriage of freight cars would not exclude carriage of commodities generally. Moreover, the Seatrain application was not reopened for consideration by the Commission until its decision in *Foss Launch & Tug Co.*, 260 I. C. C. 103, decided December 18, 1943. There the Commission pointedly ruled for the first time that a certificate to carry "commodities generally" did not authorize water carriage of loaded or unloaded freight cars—so-called "car-ferry service." Thus it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the *Foss* case. This conclusion is supported by the fact that in prior proceedings involving Seatrain, the Commission had re-

jected the contention that Seatrain's vessels could be classed as "car ferries," and had concluded that they were ocean going water carriers.[2]

Since the proceedings apparently were not reopened to correct a mere clerical error but were more likely an effort to revoke or modify substantially Seatrain's original certificate under the new policy announced in the *Foss* case, the question remains whether the Act authorizes such alterations. The water carrier provisions are part of the general pattern of the Interstate Commerce Act which grants the Commission power to regulate railroads and motor carriers as well as water carriers.[3] The Commission is authorized to issue certificates to all three types of carriers. But it is specifically empowered to revoke only the certificates of motor carriers. Section 212 (a), Part II, Interstate Commerce Act, 49 Stat. 555, 49 U. S. C. § 312 (a). In fact, when the water carrier provisions were pending in Congress, the Commission's spokesman, Commissioner Eastman, seems specifically to have requested the Congress to include no power to revoke a certificate. The Commissioner explained that while the power to revoke motor carriers' certificates was essential as an effective means of enforcement of the motor carrier section, it was not necessary to use such sanctions in the regulation of water carriers.[4] It is contended nonetheless

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[2] See *Investigation of Seatrain Lines, Inc.*, *supra*; *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry.*, 226 I. C. C. 7; *Hoboken Manufacturers R. R.* v. *Abilene & So. Ry. Co.*, 248 I. C. C. 109, but see Commissioner Patterson dissenting, *id.* at 120.

[3] 24 Stat. 379 (as amended), 49 U. S. C. § 1 *et seq.* (railroads); 49 Stat. 543, 54 Stat. 919, 49 U. S. C. § 301 *et seq.* (motor carriers); 54 Stat. 929, 49 U. S. C. § 901 *et seq.* (water carriers).

[4] Commissioner Eastman, Chairman of the Commission's Legislative Committee, reporting to the Senate Committee on Interstate and Foreign Commerce on S. 2009 on January 29, 1940, stated, "This bill leaves section 212 (a) unchanged and has no corresponding provision in the new part III. While there is room for argument we are inclined

that the Commission has greater power to revoke water carrier certificates, where Congress granted no specific authority at all, than to cancel and revoke motor carrier certificates where specific but limited authority was granted. But in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in § 212 (a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. *Smith Bros. Revocation of Order*, 33 M. C. C. 465.

It is argued, however, that this proceeding does not effect a partial revocation of Seatrain's certificate, but is merely an exercise of the Commission's statutory power under § 309 (d) to fix "terms, conditions and limitations" for water carrier certificate holders. Whether the Commission could, under this authority, have imposed a restriction in an original certificate as to the type of service a water carrier could utilize to serve its shippers best is by no means free from doubt. Yet the alleged authority to alter a certificate after it has been finally granted so as to limit the type of service is certainly no greater than the Commission's authority to limit the type of service when issuing the original certificate. It is of some significance that § 208 which prescribes the authority of the Commission in granting certificates to motor carriers authorizes the Commission to "specify the service to be ren-

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to believe that provision for the revocation or suspension of water-carrier certificates is not essential if adequate penalty provisions are provided for violation of part III. Revocation or suspension, in the case of motor carriers, is believed to be the most effective means of enforcement since there are so many such carriers and the operations of the great majority are so small, that enforcement through penal actions in courts presents many practical difficulties, but this is not true of water carriers."

dered" by those carriers. But § 309 which empowers the Commission to grant certificates to water carriers does not authorize the Commission to specify "the service to be rendered." Furthermore, § 309 (d) relating to water carrier certificates specifically provides "That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require . . ." The language of this section would seem to preclude the Commission from attaching terms and conditions to a certificate which would deprive the public of the best type of service which could be rendered between ports by a water carrier. In view of this difference between the statutory authority of the Commission to prescribe the service of water carriers and of motor carriers, our decisions relating to the Commission's power as to motor carriers in this respect [5] are not controlling as to the Commission's power to regulate the details of the service of water carriers. We can find no authority for alteration of Seatrain's certificate from the Commission's power to fix "terms and conditions."

Nor do we think that the Commission's ruling was justified by the language of § 315 (c) which authorizes it to "suspend, modify, or set aside its orders under this part under such notice and in such manner as it shall deem proper." That the word "order", as here used, was intended to describe something different from the word "certificate" used in other places, is clearly shown by the way both these words are used in the Act. Section 309 describes the certificate, the method of obtaining it, and its

[5] *Chicago St. P. & M. & O. Ry. v. U. S.*, 322 U. S. 124; *Crescent Express Lines v. U. S.*, 320 U. S. 401; *Noble v U. S.*, 319 U. S. 88. See also *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465; *Quaker City Bus Co.*, 38 M. C. C. 603.

scope and effect, but it nowhere refers to the word "order." Section 315 of the Act, having specific reference to orders, and which in subsection (c), here relied on, authorizes suspension, alteration, or modification of orders, nowhere mentions the word "certificate."[6] It is clear that the "orders" refered to in 315 (c) are formal commands of the Board relating to its procedure and the rates, fares, practices, and like things coming within its authority. But as the Commission has said, as to motor carrier certificates, while the procedural "orders" antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding.[7] The certificate, when finally granted, and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress. Consequently, the Commission was without authority to revoke Seatrain's certificate. That certificate, properly interpreted, authorized it to carry commodities generally, including freight cars on the routes for which the certificate originally issued. The judgment of the District Court is

Affirmed.

MR. JUSTICE RUTLEDGE concurs in the result.

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[6] And §§ 316 and 317 of the Act pointedly treat an order as one thing and a certificate as another.

[7] See *Smith Bros. Revocation of Certificate, supra, Quaker City Bus Co., supra.*